Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

The Wilson Corporation, et al.,
Petitioners,

v.

Tom Udall, Attorney General of New Mexico,
Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of New Mexico

---

PETITION FOR A WRIT OF CERTIORARI

F. Edwin Hallman, Jr.
Counsel of Record

F. Edwin Hallman, Jr.
David C. Moss
Decker & Hallman
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500
Counsel for Petitioners

August 26, 1996

24 pp

QUESTION PRESENTED

Whether NMSA 1978 § 57-1-1, *et seq*. violates the Fourth Amendment to the United States Constitution and the requirements established by this Court in *U.S. v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed.2d 112 (1964), if a court may enforce Civil Investigative Demands ("CIDs") issued under the statute on the mere allegation that a single proper purpose to use the CIDs is present, regardless of the presence of multiple improper purposes.

LIST OF PETITIONERS, WITH PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The following list includes all Petitioners before this Court and the court below, together with their parent companies and non-wholly owned subsidiaries:

The Wilson Corporation

Colomex Oil & Gas Co.

Ross Oil Company

Robinson Oil Company

Berridge Distributing Co., Inc.

Metzger Stores

Polk Oil Company

Dial Oil Company

Eagle Energy, Inc.

Farmington Oil Company

Graves Oil & Butane Co., Inc.

Honstein Oil Company

Indian Capital Distributing Co.

Latasa Oil Company

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IN THE SUPREME COURT OF THE UNITED STATES

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The Wilson Corporation; Colomex Oil & Gas Co.; Ross Oil Company; Robinson Oil Company; Berridge Distributing Co., Inc.; Metzger Stores; Polk Oil Company; Dial Oil Company; Eagle Energy, Inc.; Farmington Oil Company; Graves Oil & Butane Co., Inc.; Honstein Oil Company; Indian Capital Distributing Co.; and Latasa Oil Company respectfully petition for a writ of certiorari to review the judgment of the Eight Judicial District Court, Colfax County, State of New Mexico (hereinafter the "District Court").

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico denying the motion for rehearing is not reported (*see* Appendix, pp. 64-65). The denial by the Supreme Court of the State of New Mexico of the petition for writ of certiorari is reported at 916 P.2d 844 (N.M. 1996) (*see* Appendix, pp. 45-46). The opinion of the Court of Appeals for the State of New Mexico is reported at 916 P.2d 1344 (N.M. App. 1996) (*see* Appendix, pp. 2-23). The opinion of the Eighth Judicial District Court, Colfax County, State of New Mexico is not reported (*see* Appendix, pp. 46-59).

JURISDICTION

The Supreme Court of the State of New Mexico entered its Order Denying the Petitioners' Motion for Rehearing of the court's Order Denying Petition for Writ of Certiorari on June 5, 1996 (*see*, Appendix, pp. 64-65). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) which provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any state is drawn in question on the ground of being repugnant to the Constitution, treaties, or laws of the United States. . . .

STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment of the United States Constitution provides, in relevant part, that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (*see* Appendix, p. 67).

2. The New Mexico Antitrust Act, NMSA 1978 § 57-1-1 *et seq.* (Repl. Pamp. 1987) (*see* Appendix, pp. 69-81).

STATEMENT OF THE CASE

A. The Nature of the Case.

Respondent, the Attorney General of New Mexico, Tom Udall, Esq. (hereinafter the "Attorney General") applied for Civil Investigative Demands (hereinafter the "CIDs") to be issued to certain New Mexico petroleum marketers pursuant to the New Mexico Antitrust Act, NMSA 1978 § 57-1-1 *et seq.* (Repl. Pamp. 1987) (hereinafter the "New Mexico Antitrust Act"). The issue on appeal to this Court arises from the Opinion of the

New Mexico Court of Appeals dated March 19, 1996, (hereinafter the "Opinion") (*see* Appendix, pp. 2-23) which upheld and sanctioned enforcement of the CIDs issued to Petitioners, even when the CIDs are used by the Attorney General for improper purposes, if the Attorney General alleges the presence of only one proper purpose behind his investigation. The New Mexico Antitrust Act, as interpreted in the Opinion, clearly violates the Fourth Amendment prohibition against "unreasonable searches and seizures." The interpretation of the scope of the New Mexico Antitrust Act in the Opinion is contrary to this Courts holding in *U.S. v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed.2d 112 (1964).

The New Mexico Court of Appeals, citing this Court's opinion in *Powell*, erroneously held that:

> [i]f the Attorney General makes the necessary showing, the person challenging the CID bears the burden of establishing some impropriety in the CID, such as the absence of a proper purpose for the CID. . . .

(Emphasis added) (*see* Appendix, pp. 15-16).

Further, the New Mexico Court of Appeals erroneously held that CIDs would not be quashed absent a showing that "alleged improper purposes were the Attorney General's only purposes" (emphases added) (*see* Appendix, p. 19).

Petitioners argued that requiring a demonstration that the "alleged improper purposes were the Attorney General's only purposes [behind pursuing the CIDs]," (*see* Petition for Writ of Certiorari to the Supreme Court of New Mexico, pp. 9-10) violated federal precedent and Petitioners' Fourth Amendment rights under the United States Constitution.

B. The Course of Proceedings.

The Attorney General alleges that he needs certain corporate documents and other confidential information from Petitioners to further his investigation of pricing and marketing of gasoline. The Attorney General applied for and obtained CIDs from the First Judicial District Court of New Mexico, which were allegedly to be used to obtain "historic price information for a period of three years" from Petitioners.

In the consolidated case before the District Court, Petitioners filed Petitions for Declaratory Judgment, (hereinafter the "Petitions") challenging the Attorney General's authority to enforce the CIDs. In the Petitions, Petitioners argued that: (1) the Applications for CIDs did not establish sufficient grounds to support the Attorney General's claim that the Petitioners had information or documents relevant to an investigation for antitrust violations in New Mexico; (2) the Attorney General violated Petitioners' rights of due process and equal protection under the United States Constitution and the New Mexico Constitution; (3) the CIDs were issued for improper purposes; and (4) the issuance of the CIDs was

unconstitutional because the Applications did not establish "reasonable cause" to believe that a violation of the New Mexico Antitrust Act had occurred.

The Attorney General responded to the Petitions by filing Motions to Dismiss on the grounds that the Petitions failed to state a claim and that Petitioners had an adequate remedy at law. The Attorney General also petitioned the District Court for enforcement of the CIDs. In response, Petitioners filed Motions for Summary Judgment or, in the Alternative, to Quash the CIDs or Motions to Quash (hereinafter collectively the "Two Motions"), depending upon the posture of the case with respect to each Petitioner. In support of the Two Motions, Petitioners filed Statements of Material Facts as to Which No Genuine Issue Exists ("SMFs") setting forth specific facts showing that the Attorney General was pursuing the CIDs for improper purposes, i.e., political purposes, including the Attorney General's desire to lobby for and facilitate enactment of legislation to artificially lower gasoline prices. The Attorney General failed to respond to the SMFs.

The District Court, by letter and Notice of Hearing dated October 21, 1994, notified the parties that an evidentiary hearing was to be held concerning all outstanding motions to be heard and outlined the burdens of proof of the parties. A properly noticed evidentiary hearing, at which all parties were represented by counsel regarding all of the issues before the District Court, was held for an entire day on November 16, 1994, (hereinafter the "Hearing"). During the presentation of his case in chief, the Attorney General did not present any evidence,

only argument of counsel. The conclusion of the Attorney General's case was followed by Petitioners' motion to dismiss the Attorney General's petitions to enforce the CIDs and to quash the CIDs. Petitioners' motions were denied. Next, Petitioners presented substantial evidence in support of their case. At the conclusion of the Hearing, Petitioners again made motions to dismiss the petitions to enforce the CIDs and to quash the CIDs, which were again incorrectly denied.

C. The Disposition in the New Mexico Courts.

Subsequent to the Hearing, Petitioners and the Attorney General submitted proposed Findings of Fact and Conclusions of Law to the District Court. On February 23, 1995, the District Court, with only slight exception, adopted the Findings of Fact and Conclusions of Law submitted by the Attorney General and issued an order enforcing the CIDs (*see* Appendix, pp. 29-44). On March 15, 1995, the District Court dismissed the Petitions (hereinafter the "March 15 Order") (*see* Appendix, pp. 25-28).

On April 13, 1995, the District Court granted Petitioners' Motion for Extension of Time to File an Appeal of the March 15 Order.

On April 26, 1995, the District Court entered the revised Decision and Order, granting the Attorney General's Cross-Petitions to Enforce the CIDs and denying any relief to Petitioners (hereinafter the "April 26 Decision") (*see* Appendix, pp. 48-62).

On May 11, 1995, Petitioners filed a timely Notice of Appeal of the March 15 Order and the April 26 Decision. After Petitioners and the Attorney General submitted their respective appellate briefs, the Court of Appeals issued an opinion on March 19, 1996, affirming the April 26 Decision (*see* Appendix, pp. 2-23).

The Court of Appeals held that:

> We need not determine whether there was sufficient evidence to support the district court's finding that the Attorney General had a proper purpose. To affirm, it suffices if it was rational for the district court to be unpersuaded by the Marketers' evidence that the Attorney General was motivated solely by an improper purpose.

(Emphasis added) (*see*, Appendix, p. 20).

Petitioners filed a timely Petition for Certiorari on April 4, 1996, with the Supreme Court for the State of New Mexico. On May 2, 1996, the Supreme Court of New Mexico denied the Petition for Certiorari (*see* Appendix, pp. 45-46). On June 5, 1996, the Supreme Court of New Mexico denied Petitioners' Motion for Rehearing (*see* Appendix, pp. 64-65).

D. Summary of the Facts Relevant to the Issues Presented for Review.

The Attorney General failed to introduce any evidence at the evidentiary hearing to support his alleged reasons for applying for the CIDs. Instead, the Attorney General, through counsel, provided mere argument to the District Court during the hearing to determine the enforceability of the CIDs and stated "I think I'm gonna pass" when the opportunity to present evidence occurred.

The District Court verified that the Attorney General did not present any evidence to support the CIDs. After the Attorney General failed to present evidence during his case in chief at the Hearing, the hearing transcript reflects that the District Court stated: "I'm not sure technically we have anything as evidence at this point, ..." Although the District Court correctly found that the Attorney General failed to present evidence, the District Court, nevertheless, deferred completely to the Attorney General's unsupported pleadings. The record is devoid of support for the District Court's ruling in favor of the Attorney General on any basis.

Evidence introduced by Petitioners at the Hearing and in the subsequent pleadings proved that the CIDs were sought for improper purposes and should be quashed.

The Attorney General, in his pleadings, alleged that, after over a year of investigation of prices of gasoline, he applied to the First Judicial District Court in Santa Fe, New Mexico for CIDs, which he alleged were issued to individuals and companies involved in the New

Mexico petroleum market, including Petitioners. However, the Attorney General never offered any proof in support of even these most basic allegations.

On the other hand, at the Hearing, after the Attorney General failed to present any evidence and after a motion to dismiss was made by Petitioners at the end of the Attorney General's case, Petitioners submitted into evidence a report entitled "Gasoline Pricing and Marketing in New Mexico an Interim Report, May 1994" (hereinafter the "Report") prepared by the Attorney General during his investigation. In addition, Petitioners submitted testimony of several witnesses in support of Petitioners' claims that the investigation and CIDs were intended to obtain information which would be used for improper legislative and political purposes. The Attorney General's press secretary provided key evidence which established the legislative purposes behind the Attorney General's request for issuance of the CIDs.

The Report issued by the Attorney General in May of 1994 during his investigation, demonstrated that the Attorney General's investigation was intended to compile information about the New Mexico petroleum market for political use by the Attorney General and the New Mexico Legislature. This information would be used to draft legislation designed to fix and lower the retail price of gasoline artificially, without regard to economic factors present in New Mexico and without regard to whether violations of the law had occurred. The Report was highly unusual and unprecedented in its issuance in the middle of an investigation by the Attorney General. The following statements were taken from the Report:

> About a year ago, we determined that continued consumer concerns, and calls for legislation to deal with the perceived problem of gasoline prices in New Mexico, required a more sophisticated analysis of this industry than had been done in this state in the past.

(Emphasis added). Some of the "questions" which the Attorney General's investigation is intended to answer are as follows:

> Are the antitrust laws as they are presently written sufficient to deal with whatever problems are found with pricing in this industry? Are stronger laws needed to discourage price discrimination, for example? Or is some other form of direct state involvement in the pricing of gasoline warranted by the realities of this market and consumer needs?

The Attorney General, after eleven months of investigation into the New Mexico petroleum market in which he found no evidence of illegality, made the commitment to focus his continued investigation as follows:

> If, however, we determine that the relative lack of price competition is not the result of violations of the existing antitrust laws, we will consider formulating legislative alternatives for dealing with the problem.

(Emphasis added). The purpose of the continued investigation, is set forth in the Executive Summary of the Report as follows:

> the Attorney General's staff will review legislation enacted in other states intended to foster increased competition in gasoline markets and decrease retail gasoline prices and consider legislative solutions to the problem.

(Emphasis added).

The Attorney General admitted, through counsel, at the Hearing and at a hearing on November 23, 1994, in the case styled *Bar-F Enterprises, et al v. State of New Mexico*, Third Judicial District Court, State of New Mexico, Civil Action File Nos. CV-94-673 and CV-94-674, that no probable or reasonable cause existed to believe that a violation of the New Mexico Antitrust Act had occurred at the time he filed applications for CIDs.

REASONS FOR GRANTING THE PETITION

The Opinion allows CIDs to be enforced under the New Mexico Antitrust Act on the mere showing of one proper purpose behind the Attorney General's investigation, regardless of the possible presence of multiple improper purposes behind the investigation. Under the Opinion, the Attorney General's burden on motion to enforce the CIDs is met by his mere statement that, if he finds evidence of violations of the New Mexico

Antitrust Act, he will pursue criminal or civil actions. This unconstitutional burden is easily met, by the Attorney General's unsupported statements in pleadings, although uncontroverted evidence established that the Attorney General was using the CIDs for political and legislative purposes. The burden should be the converse, requiring the courts to quash CIDs which are shown to be used for an improper purpose, regardless of the presence of proper purposes. If a search or seizure is accomplished for an improper purpose, the search or seizure is clearly "unreasonable" under the Fourth Amendment.

The Opinion also conflicts with a precedent established by this Court in *U.S. v. Powell*, 379 U.S. 48 (1964).

The *Powell* opinion involved the judicial enforcement of a summons issued by the United States Internal Revenue Service (hereinafter the "IRS"), directing a corporate taxpayer to produce certain corporate tax records. This Court held that:

> [the IRS Administrator] **must** show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . . It is the court's process which is invoked to enforce the administrative summons and a court may not

> permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. . . .

(Emphasis added). *Powell*, 85 S. Ct. at 255.

According to *Powell*, the good faith requirements which must be satisfied to obtain enforcement of a summons are that: (1) the investigation has a legitimate purpose; (2) the inquiry is relevant to the purpose; (3) the information sought is not already in the [requesting party's] possession; and (4) the investigation is not being conducted for an improper purpose; and (5) the statutorily required administrative steps have been followed. *U.S. v. Stuart*, 489 U.S. 353, 354, 109 S. Ct. 1183, 1184, 103 L. Ed. 388 (1989). *U.S. v. MacKay*, 608 F.2d 830, 833 (10th Cir. 1979); *U.S. v. Lask*, 703 F.2d 293, 296 (8th Cir. 1983); *LaMura v. U.S.*, 765 F.2d 974, 979 (11th Cir. 1985).

In *Lask*, the United States Court of Appeals for the Tenth Circuit found that good faith standard established in *Powell* was satisfied as follows: (1) there was testimony at the hearing regarding the summons issued for a bank's records which supported the legitimacy of the IRS's purpose in requesting the returns; (2) "the materials sought were entirely relevant" because an IRS agent testified that the information was necessary to compute tax liability; (3)

there was no indication that the IRS was pursuing matters of which it was already aware. In fact, the IRS agent testified that, without the records, he had nothing else to depend on; and (4) the administrative steps were carried out.

First, unlike the court in *Lask*, the District Court failed to evaluate whether the Attorney General is pursuing the CIDs for a legitimate purpose. At the Hearing, the Attorney General declined to provide any evidence to demonstrate good faith in applying for the CIDs. Rather, as shown in the record below, he declared "I think I'm gonna pass." On the other hand, the Petitioners did produce a great deal of evidence showing that the Attorney General obtained the CIDs for the clearly improper purpose of furthering his political, legislative agenda based upon his speculative perceptions about the need to lower gasoline prices in New Mexico through legislation. Indeed, there was evidence of retribution by the Attorney General against Petitioners who are his political adversaries. The evidence of improper purposes as disclosed in the record of the hearing before the District Court was unrefuted and falls squarely within the prohibitions of *Powell*.

Second, the Attorney General did not produce evidence at the Hearing, nor did the District Court determine whether the Attorney General's inquiry for documents from the Petitioners was proper or relevant to his alleged purpose of needing the documents for an investigation related to possible antitrust violations.

The New Mexico Court of Appeals erroneously held that the CIDs would not be quashed absent a showing that "alleged improper purposes were the Attorney General's only **purposes**." (*See* Appendix, p. 19). Further, the New Mexico Court of Appeals irrationally stated "[t]o affirm, it suffices if it was rational for the district court to be unpersuaded by the Marketers' evidence that the Attorney General was motivated solely by an improper purpose." (*See* Appendix, p. 20). Under *Powell*, a CID issued for an improper purpose, which reflects on the good faith of the particular investigation, cannot be enforced by the courts, regardless of whether there is also a proper purpose for the investigation. The *Powell* standard is necessary to prevent an Attorney General from using his office for political vengeance.

In addition to the widespread support for the guidelines established in *Powell*, federal courts have consistently found that CIDs may not be used for "aiding any legislative or political inquiry." *Petition of Emprise Corp.*, 344 F. Supp. 319, 322 (W.D. N.Y. 1972). *See also*, *In the matter of Petition of Cleveland Trust Co.*, 1972 Trade Cases ¶ 73,991 (N.D. Ohio 1969); *Chattanooga Pharmaceutical Ass'n v. U.S. Dep't of Justice*, 358 F.2d 864 (6th Cir. 1966); and *Finnell v. U.S. Dep't of Justice*, 535 F. Supp. 410 (D.C. Kan. 1982).

Allowing CIDs to be used for single or multiple improper purposes, as long as at least one proper purpose is present, mocks the dictates of the Fourth Amendment prohibition against unreasonable searches and seizures and renders the *Powell* decision and its progeny lifeless. An

imperative need is present to restrict the improper use of CIDs by state and federal agencies. CIDs are nothing more than warrants to search papers and compel testimony without any showing of probable cause. Since the Attorney General, at his option, may use the information and documents obtained under the CIDs to pursue civil and/or criminal convictions against the recipients of the CIDs, the courts must uphold the protections afforded under the Fourth Amendment. Otherwise, according to the courts of New Mexico, a state attorney general can punish political adversaries and pursue improper purposes with impunity, as long as he simply alleges at least one proper purpose.

This case represents an important opportunity for this Court to prevent the systematic erosion of the Fourth Amendment, as interpreted in *Powell*, by the various States which ignore the protections of the Fourth Amendment by enforcing CIDs, having at least one proper purpose, regardless of numerous improper purposes. Allowing enforcement of CIDs which are used for improper purposes is an affront to this Court's authority in *Powell*, and an abrogation of the Fourth Amendment to the Constitution of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

F. Edwin Hallman, Jr.
David C. Moss
Counsel of Record

Decker & Hallman
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500

Counsel for Petitioners

August 26, 1996

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F. Edwin Hallman, Jr.
Counsel of Record

F. Edwin Hallman, Jr.
David C. Moss
Decker & Hallman
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500
Counsel for Petitioners

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OPINIONS

OPINION

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STATE OF NEW MEXICO
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Opinion Number _____

Filing Date: _____

Docket No. 16,484

THE WILSON CORPORATION, et al.,

Petitioners-Appellants,

vs.

STATE OF NEW MEXICO, ex rel.
TOM UDALL, Attorney General,

Respondent-Appellee.

TOM UDALL, Attorney General
of the State of New Mexico,

Petitioner-Appellee,

vs.

THE WILSON CORPORATION, et al.,

Respondents-Appellants,

and

BERRIDGE DISTRIBUTING CO., INC., et al.,

Intervenors/Cross-Petitioners-Appellants.

APPEAL FROM THE DISTRICT COURT
OF COLFAX COUNTY
PEGGY J. NELSON, District Judge

F. Edwin Hallman, Jr.
David C. Moss
Decker & Hallman
Atlanta, GA

Paul Bardacke
Peter S. Kierst
Kerry Kiernan
Eaves, Bardacke & Baugh, P.A.
Albuquerque, NM

for Appellants
The Wilson Corporation, et al.

Tom Udall, Attorney General
Jerome Marshak,
Assistant Attorney General
Santa Fe, NM

Susan G. White,
Assistant Attorney General
Albuquerque, NM

for Appellees
State of New Mexico

OPINION

HARTZ, Judge.

1. Pursuant to the New Mexico Antitrust Act, NMSA 1978, § 57-1-1 to -15 (Repl. Pamp. 1995), the Attorney General obtained approval from the Santa Fe County District Court for civil investigative demands (CIDs) directed to a number of companies for information regarding the pricing and marketing of gasoline in New Mexico. The requests for the CIDs were granted ex parte. See § 57-1-5(A). After service of the CIDs, some recipients raised challenges in various courts around the state. This is the second appeal to arise from those challenges.

2. The first appeal concerned a district court summary judgment quashing five of the CIDs. See Brewer Oil Co. v. State of New Mexico ex rel. Attorney General, ___ N.M. ___, 908 P.2d 799 (Ct. App. 1995), cert. denied, ___ N.M. ___, 907 P.2d 1009. The district court had ruled that the Attorney General had an improper purpose in seeking the CIDs. We reversed, holding that (1) the CIDs could be quashed only if the sole purpose of the Attorney General was an improper one and (2) the undisputed facts before the district court did not compel the inference that the sole purpose of the Attorney General was improper. Id. at ___, 908 P.2d at 801-03. In the course of the opinion we stated that the Attorney General could obtain enforcement of a CID without producing evidence of a violation of the Antitrust Act; all that was necessary was "that the Attorney General be conducting a

civil investigation to determine whether the Antitrust Act has been violated and that there be reasonable cause to believe that the recipient of the CID has information or materials relevant to the investigation." Id. at ___, 908 P.2d at 800.

3. This appeal involves a different district court and different companies. Proceedings from several judicial districts were consolidated in the Colfax County District Court. Some of the proceedings had been initiated by motions to quash filed by recipients of the CIDs (the Marketers). Others apparently had been initiated by petitions filed by the Attorney General seeking orders compelling compliance with CIDs.[1] See Section 57-1-5(B). After an evidentiary hearing the district court ordered the Marketers to comply with the CIDs. The Marketers raise the following contentions on appeal: (1) the Antitrust Act and the New Mexico Constitution require the Attorney General to establish reasonable cause that a violation of the Act has occurred or is occurring before a CID may be enforced; (2) on the record before the district

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[1] Eventually the Attorney General filed a petition to enforce against each Marketer. Therefore, we need not decide on this appeal whether recipients of CIDs may move to quash or whether the sole available procedure for judicial review is for the recipient to refuse to comply with the CID and then await initiation of an enforcement proceeding by the Attorney General. See Reisman v. Caplin, 375 U.S. 440 (1964) (taxpayer cannot obtain injunction or declaratory judgment against IRS summons).

court the Attorney General failed to establish the propriety of the CIDs and the Marketers demonstrated that the CIDs were issued for improper purposes; and (3) the district court improperly denied the Marketers an opportunity to obtain discovery from the Attorney General. We affirm.

I. REASONABLE CAUSE

4. The Marketers contend that a court can enforce a CID only if the Attorney General can show reasonable cause to believe that the Antitrust Act has been or is being violated. We disagree. Such a requirement would substantially thwart the purpose of CIDs. After all, the objects of our consideration are civil investigative demands. When the Attorney General is investigating whether the Antitrust Act has been violated, the answer to the inquiry is still unknown. If the Attorney General were reasonably satisfied that a violation had occurred or was occurring, he could bring a civil action under the Antitrust Act and obtain relevant records or other information through ordinary civil discovery. See §§ 57-1-7 (attorney general may bring an action for civil penalties), 57-1-8 (attorney general may seek injunctive relief); SCRA 1986, 1-011 (Repl. 1992) (pleading should not be filed without belief that there is good ground to support it). CIDs enable the Attorney General to obtain information without first accusing anyone of violating the Antitrust Act. This power is hardly unique to our Attorney General. The United States Supreme Court recognized almost 50 years ago that agencies "charged with seeing that the laws are enforced may . . . have and exercise powers of original inquiry." United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) (FTC). Such power, which the Court

analogized to the grand jury's power of inquisition, enables the agency to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Id. at 642-43; see In re Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963) (power of United States Attorney General to obtain CIDs for antitrust investigation), aff'd, 325 F.2d 1018 (8th Cir. 1964).

5. In any event, the language of the statute is clear. The pertinent portion of Section 57-1-5(A) states:

> If the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, he may, before bringing any action, apply to the district court of Santa Fe county for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath, or to produce the document or object for inspection and copying.

The statute is satisfied if the Attorney General is conducting a civil investigation to determine whether the Antitrust Act has been or is being violated, the information or items sought would be relevant to the investigation, and there is reasonable cause to believe that

the recipient of the CID possesses the information or item. This construction of Section 57-1-5 follows the unambiguous language of the statute and comports with the interpretation of similar statutes by other courts. See Brewer Oil, ___ N.M. at ___, 908 P.2d at 800 (citing federal cases). The Attorney General may have a great deal of evidence of antitrust violations when he seeks a CID. But he need not have such evidence, and he need not disclose what he has, to obtain enforcement of a CID.

6. Nor do constitutional restrictions on government searches and seizures impose a requirement that CIDs issue only upon a showing of reasonable cause to believe that the Antitrust Act has been or is being violated. The United States Supreme Court has long held that the Fourth Amendment to the United States Constitution does not require the government to show a likelihood of a violation of law before it can obtain compulsory process. Addressing the subpoena authority of the Administrator of the Wage and Hour Division of the United States Department of Labor under the Fair Labor Standards Act of 1938, the Court stated, "The gist of the protection [provided by the Fourth Amendment] is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946). It then explained:

> Congress has made no requirements in terms of any showing of "probable cause"; and . . . any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning

> coverage [under the Fair Labor Standards Act], but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose. . . .
>
> [H]is investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grant jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited by for[e]casts of the probable result of the investigation."

Id. at 215-16 (internal quotation marks, ellipses, and footnotes omitted; emphasis added); see Morton Salt, 338 U.S. at 651-54; see also United States v. Powell, 379 U.S. 48, 57 (1964) (probable cause not necessary for IRS summons); see generally 1 Kenneth C. Davis, Administrative Law Treatise § 4:1 (3d ed. 1994). The New Mexico Supreme Court summarized the law in In re Investigation No. 2 of the Governor's Organized Crime Prevention Commission, 91 N.M. 516, 517-18, 577 P.2d 414, 415-16 (1978). It stated that for the issuance of an administrative subpoena the United States Constitution ordinarily requires only that "(a) the inquiry must be within the authority of the agency; (b) the demand must not be too indefinite; and (c) the information must be

reasonably relevant to the purpose of the investigation." Id. at 517, 577 P.2d 415.

7. We are not persuaded that Article II, Section 10 of the New Mexico Constitution would require a "probability" showing that the federal Constitution does not. We are aware of no jurisdiction that imposes such a requirement on administrative subpoenas, summonses, or CIDs as a matter of state constitutional law. See Benson v. People, 703 P.2d 1274, 1278-79 (Colo. 1985) (en banc) (state constitutional standards are identical to federal standards); Ajello v. Hartford Fed. Sav. & Loan Ass'n, 347 A.2d 113, 118 (Conn. Super. Ct. 1975) (same); State ex rel. Shriver v. Leech, 612 S.W.2d 454, 458-59 (Tenn.) (same), cert. denied, 454 U.S. 836 (1981).

8. The Marketers' argument under Article II, Section 10 rests primarily on decisions requiring warrants based on probable cause to conduct administrative searches, specifically Dunlop v. Hertzler Enterprises, 418 F. Supp. 627 (D.N.M. 1976) (warrantless OSHA search), and State ex rel. Environmental Improvement Agency v. Albuquerque Publishing Co., 91 N.M. 125, 571 P.2d 117 (1977) (warrantless search), cert. denied, 435 U.S. 956 (1978). Those decisions, which, incidentally, apply only the federal Constitution, are inapposite. The intrusion resulting from compulsory process is readily distinguishable from the intrusion resulting from a nonconsensual search. As the United States Supreme Court wrote in upholding a Department of Labor subpoena:

> The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter [the subpoenaed parties'] premises against their will, to search them, or to seize or examine their books, records or papers without their assets, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections . . . .

Oklahoma Press, 327 U.S. at 195. The Supreme Court reaffirmed the distinction between compulsory process and nonconsensual entries in Donovan v. Lone Steer, Inc., 464 U.S. 408, 414-15 (1984).

9. Moreover, probable cause does not have the same meaning in the context of administrative searches that it has in the context of searches for evidence of crime. See Camara v. Municipal Court, 387 U.S. 523, 537-39 (1967). Probable cause for an administrative search exists "[i]f a valid public interest justifies the intrusion contemplated." Id. at 539. For example, an area warrant to check for violations of health and safety codes for housing may be justified by the lack of any inspection for a significant period of time. See id. at 538. It thus appears that some administrative warrants may issue

simply because of a reasonable need to be assured that the law is not being violated. If anything, the administrative-search decisions argue against, not for, a requirement that a CID be enforced only upon a showing of probability that the Antitrust Act has been or is being violated.

10. The Marketers also rely on In re Investigation No. 2. That decision followed Morton Salt in establishing the requisites for a subpoena obtained by the Governor's Organized Crime Prevention Commission. But our Supreme Court prefaced its reference to Morton Salt by noting: "The Commission is an investigatory rather than an accusatory body and therefore its subpoenas are administrative subpoenas. Dixon v. Pennsylvania Crime Commission, 347 F. Supp. 138 (M.D. Pa. 1972); Illinois Crime Investigating Comm'n v. Buccieri, . . . 224 N.D.2d 236 (1967)." 91 N.M. at 517, 577 P.2d at 415. The Marketers argue that the Attorney General has an accusatory function, so his CIDs are not administrative subpoenas governed by Morton Salt. We disagree. That Marketers misconstrue In re Investigation No. 2. Our Supreme Court's reference to the accusatory-investigatory dichotomy can be understood by reviewing the cases cited at the end of the above-quoted sentence. In particular, Dixon, 347 F. Supp. at 141-42, clarifies that what the Court meant by an accusatory body was an agency whose function is "to find named individuals guilty of violating the criminal laws . . . and to brand them as criminals in public," as was alleged in Jenkins v. McKeithen, 395 U.S. 411, 428 (1969). The Attorney General has no such role. He does not make findings that anyone has violated the antitrust laws. He only brings actions for the courts to

decide. Moreover, Jenkins said nothing about requiring probable cause for subpoenas from an accusatory body.

11. In short, we find no support for a constitutional requirement that a CID can issue only if the Attorney General establishes a likelihood that the Antitrust Act has been or is being violated. We do not, however, minimize the power thereby granted to the Attorney General. Even reasonable CIDs can impose a heavy burden on the recipient. A CID may require disclosure of information that the recipient wishes, for perfectly appropriate reasons, to keep confidential. Collecting information and responding to inquiries can be expensive, time-consuming, and distasteful. The Attorney General's authority to obtain CIDs should not be exercised on a whim, but only for sound reasons, although it must be recognized that on occasion the public interest is served when the Attorney General's purpose is to be assured that there has been no violation of the law. See Morton Salt, 338 U.S. at 642-43. If Attorney Generals wield the CID authority imprudently, the legislature can impose a reasonable-cause requirement. See People ex rel. Babbitt v. Herndon, 581 P.2d 688 (Ariz. 1978) (en banc) (statute requires reasonable cause to believe Act has been violated). Or it can even revoke the authority altogether. That decision is for the legislature, not this Court. All we hold today is that the authority granted by Section 57-1-5 is not unconstitutional.

II. DOES RECORD SUSTAIN DISTRICT COURT'S UPHOLDING VALIDITY OF CIDs?

12. The Marketers contend that the district court should not have enforced the CIDs because (1) the Attorney General failed to present any evidence to support them and (2) the Marketers demonstrated that the CIDs were issued for improper purposes. To resolve these contentions, we must first address the nature of the proceeding in district court.

13. A proceeding to enforce or quash compulsory process--whether denominated a subpoena, a summons, or a CID--on behalf of an administrative agency is not a trial. Such proceedings are summary in nature. See In re Office of Inspector Gen., 933 F.2d 276, 277 (5th Cir. 1991); United States v. Kis, 658 F.2d 526, 535 (7th Cir. 1981) ("[W]e cannot stress too emphatically that these proceedings [regarding an IRS summons] are intended to be summary in nature."), cert. denied, 455 U.S. 1018 (1982); Stuart v. United States, 813 F.2d 243, 250 (9th Cir. 1987), rev'd on other grounds, 489 U.S. 353 (1989).

14. One reason to handle such matters summarily is that the issues to be determined lend themselves to summary disposition. The court does not need to resolve whether the investigation being conducted by the agency will bear fruit. Ordinarily it need decide only such matters as whether the investigation is within the authority of the agency, whether the information sought is relevant to the investigation, and whether the demand is sufficiently precise. See In re Investigation No. 2, 91 N.M. at 517, 577 P.2d at 415. Discovery disputes in civil litigation

raise similar questions and are customarily resolved satisfactorily in summary proceedings.

15. A second reason for summary proceedings is that an investigation can readily be thwarted and limitation periods may expire if prolonged litigation accompanies every attempt to obtain information. Courts must be vigilant in protecting the rights of those who object to providing information to an investigating agency, but delaying tactics cannot be countenances. See United States v. Witmer, 835 F. Supp. 208, 213 (M.D. Pa. 1993), aff'd, 30 F.3d 1489 (3d Cir. 1994).

16. To best accommodate the competing interests of the Attorney General and persons opposing his authority, we adopt a procedure that has been followed in other jurisdictions. Before a court will enforce a CID, the Attorney General must make a sworn showing of the basic elements required for compulsory process. See United States v. Stuart, 489 U.S. 353, 360 (1989); United States v. Davis, 636 F.2d 1028, 1034 (5th Cir.), cert. denied, 454 U.S. 862 (1981); Kis, 658 F.2d at 536;; Babbitt, 581 P.2d at 690; Benson, 703 P.2d at 1279-80; Kohn v. State ex rel. Humphrey, 336 N.W.2d 292, 295-96 (Minn. 1983). The affidavit (or testimony) would need to establish the following: (1) the Attorney General is conducting an investigation to determine whether the Antitrust Act has been or is being violated; (2) the information sought is relevant to the investigation; and (3) there is reasonable cause to believe that the recipient of the CID possesses the information. If the Attorney General makes the necessary showing, the person challenging the CID bears the burden of establishing some

impropriety in the CID, such as the absence of a proper purpose for the CID, the privileged nature of the information sought, or the unreasonable burden imposed by the CID. See Powell, 379 U.S. at 58; United States v. Beason Fed. Sav. & Loan, 718 F.2d 49, 52 (2d Cir. 1983); Davis, 636 F.2d at 1034; In re Newton, 718 F.2d 1015, 1019 (11th Cir. 1983), cert. denied, 466 U.S. 904 (1984). The challenge should be supported by a sworn showing.

17. Although the Antitrust Act requires a hearing on the Attorney General's petition to enforce a CID, § 57-1-5(B), the scope of the hearing will depend on the nature of the challenge and the strength of the showing. On this appeal we need not, and probably could not, set forth how to conduct the hearing in every possible circumstance. That decision must be left in the first instance to the sound discretion of the trial judge, just as we leave to the sound discretion of the trial judge the procedure to be followed to resolve discovery disputes in civil litigation. See Tarkett, Inc. v. Congoleum Corp., 144 F.R.D. 282, 284-85 (E.D. Pa. 1992); 4A James W. Moore, Moore's Federal Practice ¶ 37.02[7] (2d ed. 1995). We recognize that Brewer stated that those challenging the CIDs in that case were "not foreclosed from seeking a determination on this issue on the merits, after a full evidentiary hearing." Brewer, ___ N.M. at ___, 908 P.2d at 803. But the point we were attempting to make in that opinion was only that our reversal of the summary judgment quashing the CIDs did not prevent the challengers from ultimately prevailing on the merits. We did not intend to suggest that a challenge to a CID must always be resolved by a "full evidentiary hearing." That issue had not been addressed

in the briefs and was not a matter considered by this Court.

18. Turning to the particulars of the case before us, we find no error. Although the petitions for issuance of the CIDs were unsworn, the record contains affidavits by the Attorney General with respect to each of the Marketers. Each affidavit states that his office is investigating possible violations of the Antitrust Act within the gasoline industry and describes the nature of the investigation. The affidavits also assert, although somewhat obliquely, that each of the Marketers markets gasoline. These affidavits satisfy the requirement of a sworn showing of the basic elements required for enforcement of the CIDs. From the affidavits' description of the investigation, the district court could determine whether the information sought was relevant to the investigation and whether it would be reasonable to believe that a gasoline marketer would possess the information.

19. On this appeal the Marketers do not argue that the information sought by the CIDs would be irrelevant to the investigation described in the Attorney General's affidavits. Nor do they contend that it would be unreasonable to believe that a gasoline marketer would possess the information sought. Rather, they contend that the district court erred in denying their motion for judgment at the close of the Attorney General's case because he had totally failed to put on any evidence of compliance with the requirements of Section 57-1-5(B), or even to establish the existence of the individual CIDs. The Marketers' argument appears to assume that the district court hearing was required to be of the nature of

a trial, so that any determination by the court must be supported by evidence admitted at the hearing.

20 The Marketers' argument suffers from three shortcomings. First, even if the Attorney General had failed to make a prima facie showing by the close of his case, the Marketers waived their challenge to the sufficiency of the Attorney General's evidence by proceeding to put on evidence themselves. See In re Strozzi, 120 N.M. 541, 544, 903 P.2d 852, 855 (Ct. App.), cert. denied, 120 N.M. 498, 903 P.2d 240 (1995). That is, the issue on appeal is the sufficiency of all the evidence, not just the evidence submitted before the Marketers' motion.

21. Second, even if the proceeding were a trial, a party at trial has no obligation to prove matters conceded by the opposing party in its pleadings. See Panzer v. Panzer, 87 N.M. 29, 33, 528 P.2d 888, 892 (1974). Because of the admissions in the Marketers' responses to the Attorney General's petitions for enforcement, the Attorney General was not required to put on evidence that CIDs had been issued and served upon the Marketers.

22. Third, as previously discussed, the proceeding was not a trial. The district court could appropriately consider affidavits submitted by the parties and then determine whether further evidentiary proceedings were necessary. For example, each of the Marketers submitted affidavits stating that they make pricing decisions concerning motor fuels. These affidavits eliminated any issue regarding the reasonable probability that the Marketers possessed pricing information sought by the CIDs. Also, the Attorney

General's affidavits sufficed to establish the prima facie validity of the CIDs. Although the affidavits were submitted after the evidentiary hearing, the district court accepted and considered them. On appeal the Marketers have not challenged their untimeliness. In our view, it is within the district court's discretion to accept the affidavits after the hearing, at least so long as the Marketers were not precluded from responding to them if they desired. Cf. Stuart, 813 F.2d at 250 (IRS can amend affidavit on remand). It appears from the record that the Marketers did not seek to respond to the affidavits.

23. Because the pleadings and affidavits established the prima facie validity of the CIDs, the issue before the district court became whether the Marketers had borne their burden of showing the invalidity of the CIDs in some respect. On appeal the Marketers contend that the respect in which the CIDs were invalid is that the Attorney General's purposes for seeking the CIDs were improper. They argue that the Attorney General sought the information from Marketers to advance his legislative agenda and his political career. As we stated in Brewer, however, CIDs should not be invalidated on this ground unless the alleged improper purposes were the Attorney General's only purposes. If one of the purposes of the CIDs was to obtain information for an investigation of violations of the Antitrust Act, then we must uphold the district court's order enforcing the CIDs. Courts can issue protective orders to prohibit improper use of information acquired by CIDs. See Brewer, ___ N.M. at ___, 908 P.2d at 801.

24. In this case the district court conducted an evidentiary hearing. It was not persuaded by the Marketers' evidence that the Attorney General had an improper purpose. On the contrary, the district court found: "The evidence shows that the Attorney General is investigating gasoline marketing to determine if there are any violations of the Antitrust Act." The Marketers had the burden of persuasion on this issue. The finding implies that the Marketers failed to meet their burden. We need not determine whether there was sufficient evidence to support the district court's finding that the Attorney General had a proper purpose. To affirm, it suffices if it was rational for the district court to be unpersuaded by the Marketers' evidence that the Attorney General was motivated solely by an improper purpose. See Lopez v. Adams, 116 N.M. 757, 578, 867 P.2d 427, 428 (Ct. App. 1993) ("If a finding is made against the party with the burden of proof, we [must] affirm if it was rational for the trial court to disbelieve the evidence offered by that party."), cert. denied, 116 N.M. 801, 867 P.2d 1183 (1994). Without detailing the evidence at the hearing, we hold that the evidence presented by the Marketers was not so compelling that every rational person would necessarily have determined that the only purposes of the Attorney General were improper ones. We therefore reject the Marketers challenge on appeal.

III. DISCOVERY

25. Finally, the Marketers contend that the district court erred by denying them the opportunity to conduct further discovery. Of course, if they were improperly denied discovery which could have assisted them in meeting their

burden at the district court evidentiary hearing, we would reverse to enable the Marketers to conduct discovery and then present further evidence to the district court.

26. The Marketers, however, must meet a heavy burden to be entitled to discovery in an enforcement proceeding.

> [E]nforcement actions are intended to be summary and are designed to secure quick judicial review of administrative activities. Consistent therewith, discovery is allowed in only the exceptional cases "where the circumstances indicate that further information is necessary for the courts to discharge their duty." SEC v. Dresser Indus., 628 F.2d 1368, 1388 (D.C. Cir.) (en banc) (citations omitted), cert. denied, 449 U.S. 993 . . . (1980).
>
> As a general rule, "a defendant is not 'entitled to engage in counter-discovery to find grounds for resisting' a subpoena. . . ." In re EEOC, 709 F.2d [392,] 400 [(5th Cir. 1983)] (citations omitted). A limited amount of discovery may be allowed if, for example, "the defendant 'makes a preliminary and substantial demonstration of abuse,' that is, where the defendant has presented 'meaningful evidence' that the agency is attempting to abuse its investigative authority. Anything short of this showing is not enough. . . ." Id. (citations omitted). In considering the issue

> of the scope and range of discovery in enforcement actions, courts "'must be cautions in granting . . . discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisitions into the practices of the regulatory agencies.'" United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1147 (D.C. Cir. 1987) (quoting Dresser, 628 F.2d at 1388).

In re Office of Inspector Gen., 933 F.2d at 277-78. Also, we agree with the federal appellate courts that "exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted." Id. at 278.

27. The Marketers argue that the district court erred in its finding that they had "not made a preliminary and substantial demonstration of abuse and improper motive, and therefore discovery to aid in these defenses in compliance with the CIDs will not be allowed." Yet, the Marketers' briefs on appeal do not set forth what discovery they sought or how such discovery would be relevant to the issues on appeal. We will not search the record below to determine whether there is a basis for their challenge to the district court's ruling. See In re Estate of Heeter, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App.), cert. denied, 113 N.M. 690, 831 P.2d 989 (1992). We therefore reject the Marketers' contentions regarding the denial of discovery.

IV. CONCLUSION

28. We affirm the district court order enforcing the CIDs against the Marketers.

29. **IT IS SO ORDERED.**

/s/
HARRIS L. HARTZ, Judge

WE CONCUR:

/s/
RUDY S. APODACA, Chief Judge

/s/
MICHAEL D. BUSTAMANTE, Judge

ORDERS

EIGHT JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

THE WILSON CORPORATION, Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	Civil Action No. 94-64 CV Socorro County No. CV 94-84 consolidated with No. 94-66(SQ)
TOM UDALL, ATTORNEY GENERAL, OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, *et al.* Respondent.	Civil No 94-66(SQ) No. 94-72CV Taos County Nos. 94-186 CV 94-187 CV San Juan County Nos. 94-593(SQ) 94-597(SQ) 94-598(SQ) McKinley County Nos. 94-1(SQ)

BERRIDGE DISTRIBUTING CO., INC., *et al.*,	)	94-2(SQ)
	)	Santa Fe County
	)	No. 94-147(SQ)
Intervenors and Cross-Petitioners,	)	
	)	

FILED IN OFFICE OF CLERK
OF DISTRICT COURT OF
COLFAX COUNTY NEW MEXICO
AT 10:40 O'CLOCK A.M.
ON MAR 15, 1995

ORDER DISMISSING PETITIONS FOR DECLARATORY JUDGMENT

THIS MATTER having come before the Court upon Motions by the State of New Mexico *ex rel.* Tom Udall, Attorney General ("State") to dismiss Petitions for Declaratory Judgment filed in the above-consolidated proceedings by The Wilson Corporation, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Robinson Oil Company, Ross Oil Company, Colomex Oil & Gas Company and Latasa Oil Company (collectively "Distributors"), and the Court having considered the arguments by the parties relating thereto and being otherwise fully advised in the premises;

THE COURT FINDS that the legal issues raised by the Distributors in their declaratory judgment actions are identical to those raised in defense of the State's actions to enforce the Civil Investigative Demands ("CIDs") which are the subject of these consolidated proceedings.

Accordingly, the Distributors have a full and adequate legal remedy in the defense of the State's actions to enforce those CIDs and their petitions for declaratory relief should be dismissed. *Reisman v. Caplin*, 375 U.S. 440 (1964); *In re Office of Inspector General*, 933 F.2d 276 (5th Cir. 1991).

THE COURT THEREFORE ORDERS that the Petitions for Declaratory Judgment filed by The Wilson Corporation, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Robinson Oil Company, Ross Oil Company, Colomex Oil & Gas Company and Latasa Oil Company be and hereby are dismissed with prejudice.

ORDERED this 15th day of March, 1995.

/s/ Peggy J. Nelson
DISTRICT JUDGE

Approved As to Form:

_____

E. Edwin Hallman, Jr., Esquire
David C. Moss, Esquire
Attorneys for The Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Ross Oil Company, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane, Inc.,

Eagle Energy, Inc., Indian Capitol Distributing Co., Inc., Honstein Oil Company, and Latasa Oil Company

Randolph B. Felker, Esquire
Attorney for Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc. and Honstein Oil Company

Robin C. Blair, Esquire
Attorney for The Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company and Ross Oil Company

Thomas J. Hynes, Esquire
Attorney for Dial Oil Company, Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane, Inc., Indian Capitol Distributing Co., Inc.

Norman McDonald, Esquire
Attorney for Latasa Oil Company

/s/
Susan G. White
Assistant Attorney General
Attorney for the State of New Mexico

EIGHT JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

THE WILSON CORPORATION, Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	) Civil Action No. 94-64 CV consolidated with No. 94-66(SQ)
TOM UDALL, ATTORNEY GENERAL, OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, *et al.* Respondent.	) Civil No. 94-66(SQ)

BERRIDGE DISTRIBUTING CO., INC., *et al.*,	No. 94-186 CV No. 94-187 CV No. 94-72 CV
Intervenors and Cross-Petitioners,	
STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL,	
Petitioner,	
v.	San Juan County Civil Action No. 94-593(SQ)
DIAL OIL COMPANY,	
Respondent	
STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL,	
Petitioner,	
v.	San Juan County Civil Action No. 94-597(SQ)
FARMINGTON OIL COMPANY,	
Respondent	

STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Petitioner, v. GRAVES OIL & BUTANE CO., INC., Respondent	)	San Juan County Civil Action No. 94-598(SQ)
STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Petitioner, v. EAGLE ENERGY, INC., Respondent	)	McKinley County Civil Action No. 94-1(SQ)

STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Petitioner, v. INDIAN CAPITOL DISTRIBUTING CO., Respondent	)	McKinley County Civil Action No. 94-2(SQ)
IN RE REQUEST FOR APPROVAL OF CIVIL INVESTIGATIVE DEMAND	)	Santa Fe County Civil No. SF 94-147(SQ)
LATASA OIL COMPANY, INC., Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	)	Socorro County Civil Action No. CV 94-84

FILED IN OFFICE OF CLERK
OF DISTRICT COURT OF
COLFAX COUNTY, NEW MEXICO
AT 3:41 O'CLOCK P.M.
ON FEB 23, 1995

DECISION AND ORDER

This matter came before the Court for hearing on November 16, 1994. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Colomex Oil & Gas Company, Ross Oil Company and Robinson Oil Company (collectively "Distributors"), Petitioners, Cross-Respondents and Intervenors herein, were represented by F. Edwin Hallman, Jr., David C. Moss, Robin C. Blair and Randolph B. Felker. The State of New Mexico, *ex rel.* Tom Udall, Attorney General, Petitioner, Respondent and Cross-Petitioner herein, was represented by Susan G. White and Eugene I. Zamora, Assistant Attorney Generals.

The State was required to show that the Civil Investigative Demands ("CID") were proper in form, that the State has reasonable grounds to believe that the Distributors have information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of the Antitrust Act and that the CIDs otherwise complied with the requirements of § 57-1-5 of the New Mexico Antitrust Act, NMSA 1978, as amended. The Distributors were permitted to defend and to present evidence and testimony

to support their claims that the CIDs were burdensome and oppressive, were not in proper form, were unconstitutional and were issued by the Attorney General with improper motives.

The Distributors subpoenaed the Attorney General's Communications Director, Kay Roybal, and one of the Attorney General's consultants, Sam Rodar, to testify at the hearing. Both Ms. Roybal and Mr. Rodar appeared, were examined and by agreement of counsel for Distributors thereafter excused. The Distributors also subpoenaed Attorney General Tom Udall, who did not appear. Following testimony by Ms. Roybal and Mr. Rodar, counsel for the Distributors indicated that the Distributors no longer needed Mr. Udall's testimony and withdrew Mr. Udall's subpoena.

Upon the State's unopposed motion, the following cases, each of which involves virtually identical issues of fact and law, were consolidated under Civil Action File No. 94-66(SQ) for all purposes by Order of December 30, 1994: *State of New Mexico v. Dial Oil Co.*, San Juan County Civil Action No. 94-593(SQ); *State of New Mexico v. Farmington Oil Company,* San Juan County, Civil Action No. 94-597 (SQ); *State of New Mexico v. Graves Oil & Butane Co.*, San Juan County, Civil Action No. 94-598 (SQ); *State of New Mexico v. Eagle Energy, Inc.*, McKinley County, Civil Action No. 94-1 (SQ); *State of New Mexico v. Indian Capitol Distributing Co.*, McKinley County, Civil Action No. 94-2 (SQ); *In re Request for Approval of Civil Investigative Demand*, Santa Fe County, Civil Action No. SF 94-147 (SQ); *Latasa Oil*

Company, Inc. v. *State of New Mexico*, Socorro County, Civil Action No. CV 94-84.

Based on the foregoing, the Court finds as follows:

1. The Court has jurisdiction over the parties and subject matter of these consolidated proceedings.

2. On May 31, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County pursuant to Section 57-1-5(A) of the New Mexico Antitrust Act for Civil Investigative Demands ("CIDs") to the Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Metzger Stores, Inc., Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane Company, Latasa Oil Company, and Indian Capitol Distributing Company. The First Judicial District Court approved and issued the CIDs on May 31, 1994.

3. On June 6, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County for CIDs to Berridge Distributing Company, Polk Oil Company, Dial Oil Company, Honstein Oil Company and Ross Oil Company. The First Judicial District Court approved and issued these CIDs on June 7, 1994.

4. The CIDs were served on each of the Distributors in conformance with Rule 1-004 of the New Mexico Rules of Civil Procedure, as required by Section 57-1-5(A) of the New Mexico Antitrust Act NMSA 1978 (1987 Repl.)("the Act").

5. The CIDs described the nature of the conduct under investigation by the State as sharp disparities in the price of gasoline from community to community and uniform price increases in certain communities, which together with other information suggests that competition may be limited to one or more levels of the gasoline industry.

6. The description of the nature of the conduct under investigation contained in the CIDs, while general, satisfies the requirements of Section 57-1-5(A) of the Act. The State need not describe with specificity the precise nature of the conduct under investigation, but a description of the general nature of the conduct is sufficient. To insist upon specificity at an early stage of investigation would defeat the purpose of the demand. *See Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D.Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d 1274 (Colo.1985).

7. The CIDs described the class or classes of documents or objects sought with sufficient definiteness to permit them to be fairly identified.

8. The written interrogatories were part of the CID.

9. The 30-day return date set in the CIDs was reasonable, particularly in light of the fact that the State made clear that it was flexible with respect to the return date and was willing to accommodate particular problems in responding.

10. A copy of Section 57-1-5 of the Act was appended to the CIDs, as required by Section 57-1-5(A).

11. The CIDs state that the Attorney General believes that some gasoline marketers in New Mexico may be violating § 57-1-1 *et seq.* of the New Mexico Antitrust Act and § 57-14-3 of the New Mexico Price Discrimination Act. Price discrimination may violate the Antitrust Act. Therefore even if this reference to the Price Discrimination Act is improvident since the Price Discrimination Act contains no CID provisions, it does not affect the validity of the CID.

12. No demand to produce a document or object for inspection and copying shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state.

13. The burden of demonstrating that a CID is unreasonably burdensome or otherwise improper as measured against the standards applicable to a subpoena duces tecum is upon the person contesting the CID.

14. The Distributors claimed generally that the CIDs are burdensome and oppressive. While it will undoubtedly take a considerable amount of time to compile the information sought by the State, the Distributors presented no evidence as to the form in which the information is currently held, whether computerized or not, the process by which it would have to be compiled, the realistic number of hours compilation would demand,

the cost to each company in complying, how compliance could be made easier, or other specific evidence supporting their claim or burdensomeness.

15. Based upon the CIDs themselves and the presentations of the parties, I find that these CID are not unreasonably burdensome and/or oppressive.

16. The Distributors argued that the Attorney General should pay, in advance, the cost of compliance with the CIDs.

17. The paragraph in Section 57-1-5 (A) of the Act which prohibits any request for documents from containing demands which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state provides a guideline as to the permissible scope of the CID. That paragraph does not incorporate within the Act the totality of SCRA 1-045, including the payment of costs by the State.

18. The Distributors' request for costs is denied.

19. The Distributors claim that the Attorney General sought the CIDs for improper purposes. They argue that the CIDs were sought in aid of the Attorney General's campaign for re-election; that they were sought with the purpose of advising the New Mexico State Legislature; and that the Office of the Attorney General is being uses by Sam Rodar to pursue his own personal agenda.

20. It is a fact of our electoral system that the Attorney General must run for office every four years. Tom Udall's investigation of gasoline marketing and other possible violations of the Antitrust Act may endear him to the general public. But the public's endorsement of his efforts, through re-election, do not without substantially more indicate an improper motive.

21. Distributors have not shown that the CIDs were obtained for the purpose of pursuing legislation aimed at curbing gas prices. The evidence shows that the Attorney General is investigating gasoline marketing to determine if there are any violations of the Antitrust Act.

22. Attorney General, although a part of the Executive Branch of government, often serves as advisor to the Legislature, or to individual legislators, upon request. This is entirely proper. It would be a great and unwarranted waste of state resources if after a thorough investigation the Attorney General were not in a position to share non-confidential information with the Legislature.

23. The Distributors introduced no credible evidence in support of their claim that Mr. Rodar has persuaded the Attorney General to use his office to advance Mr. Rodar's personal agenda or that Mr. Rodar has in some manner orchestrated the Attorney General's investigation. Mr. Rodar testified to the limited role he has played in working for the Attorney General, and the circumscribed scope of work in his contract with the Attorney General verifies his limited role in the investigation.

24. I find that the Distributors have not made a preliminary and substantial demonstration of abuse and improper motive, and therefore discovery to aid in these defenses to compliance with the CIDs will not be allowed.

25. The evidentiary privilege against self incrimination does not apply to , or extend to, corporations or individuals in their representative capacity. *Doe v. State*, 114 N.M. 78 (1992). There is no constitutional support for Distributors' argument that they should not be required to comply with the CIDs on the grounds that the responses thereto may tend to incriminate the corporations.

26. The Distributors' argument that the CID process in this case was constitutionally deficient because the State did not show probable cause that a violation of the Antitrust Act has occurred is not persuasive. The cases are legion which hold that the Fourth Amendment right to be free from unreasonable searches and seizures is not implicated in the civil investigative demand process. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Petition of Gold Bond Stamp Co.*, 221 F. Supp.1 391, *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

27. The process for obtaining and enforcing a CID prescribed by Section 57-1-5 of the New Mexico Antitrust Act includes judicial review of the Attorney General's application for the CID. In determining whether a CID satisfies constitutional requirements, the court must determine (a) that the investigation is for a lawfully

authorized purpose; (b) that the information sought is relevant to the inquiry; and (c) that the CID is sufficiently specific to obtain documents which are adequate but not excessive for the inquiry. A CID is reasonable without probable cause if it satisfies those criteria.

28. Although Art. II, Sec. 10 of the New Mexico Constitution may provide broader protection than does the Federal Constitution in some respects, Section 57-1-5 of the New Mexico Antitrust Act and the process followed by the Attorney General in obtaining CIDs in this case conforms with the requirements of the New Mexico Constitution.

29. The Attorney General is required by Section 57-1-5(C) of the Antitrust Act to keep confidential any material produced pursuant to the Act, prior to filing an action for violations under investigation. To the extend the Distributors believe they need additional protection for information provided in response to the CIDs they may pursue a motion for a protective order. However, such motions and any required motions hearing should not delay compliance with the CIDs in the interim.

30. In summation, I find that the CIDs are proper in form and that there is reasonable cause to believe that each of the Distributors has information or may be in possession, custody or control of documents or other tangible objects relevant to a civil investigation for violations of the Antitrust Act.

THEREFORE, THE COURT ORDERS as follows:

1. The State's Motions for Protective Order with respect to the Distributors' Interrogatories and Requests for Production of Documents are granted;

2. The State's Motion to Quash Subpoena Duces Tecum with respect to Sam Rodar is granted;

3. The Distributors' Motions for Summary Judgment or in the Alternative to Quash Civil Investigative Demands are denied;

4, The State's Petitions for Order requiring each of the Distributors to comply with Civil Investigative Demands are granted;

5. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Ross Oil Company, Robinson Oil Company, Colomex Oil & Gas Company, Eagle Energy, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane Company, Indian Capitol Distributing Company, Honstein Oil Company, and Latasa Oil Company shall each of them comply fully and under oath within 30 days of entry of this Order with the Civil Investigative Demands issued variously by the First Judicial District Court, Santa Fe County, on May 31, 1994 and June 7, 1994; and

6. The Court will retain jurisdiction of these cases for the purpose of resolving any disputed that may arise in the course of compliance with these CIDs.

ORDERED this 23rd day of February, 1995.

/s/ Peggy L. Nelson
District Judge

Approved As to Form:

_____

E. Edwin Hallman, Jr., Esquire
David C. Moss, Esquire
Attorneys for The wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Ross Oil Company, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane, Inc., Eagle Energy, Inc., Indian Capitol Distributing Co., Inc., Honstein Oil Company, and Latasa Oil Company

Randolph B. Felker, Esquire
Attorney for Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc. and Honstein Oil Company

Robin C. Blair, Esquire
Attorney for The Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company and Ross Oil Company

Thomas J. Hynes, Esquire
Attorney for Dial Oil Company, Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane, Inc., Indian Capitol Distributing Co., Inc.

Norman McDonald, Esquire
Attorney for Latasa Oil Company

/s/

Susan G. White
Assistant Attorney General
Attorney for the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Thursday, May 2, 1996

NO. 23,583

THE WILSON CORPORATION, et al.,

Petitioners-Petitioners,

vs.

STATE OF NEW MEXICO, ex rel.,
TOM UDALL, ATTORNEY GENERAL,

Respondent-Respondent,.

TOM UDALL, Attorney General
of the State of New Mexico,

Petitioner-Respondent,

vs.

THE WILSON CORPORATION, et al.,

Respondents-Petitioners,

and

BERRIDGE DISTRIBUTING CO., INC.,

Intervenors-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals numbers 16484.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Chief Deputy

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

EIGHT JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

THE WILSON CORPORATION, Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	) Civil Action No. 94-64 CV) Socorro County) No. CV 94-84 consolidated with No. 94-66(SQ)
TOM UDALL, ATTORNEY GENERAL, OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, *et al.* Respondent.	) Civil No. 94-66(SQ)) No. 94-72 CV) Taos County) Nos. 94-186 CV 94-187 CV) San Juan County) Nos. 94-593(SQ) 94-597(SQ) 94-597(SQ)) Mc.Kinley County

BERRIDGE DISTRIBUTING CO., INC., *et al.*,	)	Nos. 94-1 (SQ) 94-2(SQ)
	)	Santa Fe County
Intervenors and Cross-Petitioners,	)	No. 94-147 (SQ)

FILED IN OFFICE OF CLERK
OF DISTRICT COURT OF
COLFAX COUNTY, NEW MEXICO
ON APRIL 26, 1995

DECISION AND ORDER

This matter came before the Court for hearing on November 16, 1994. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Colomex Oil & Gas Company, Ross Oil Company and Robinson Oil Company (collectively "Distributors"), Petitioners, Cross-Respondents and Intervenors herein, were represented by F. Edwin Hallman, Jr., David C. Moss, Robin C. Blair and Randolph B. Felker. The State of New Mexico, *ex rel.* Tom Udall, Attorney General, Petitioner, Respondent and Cross-Petitioner herein, was represented by Susan G. White and Eugene I. Zamora, Assistant Attorney Generals.

The State was required to show that the Civil Investigative Demands ("CID") were proper in form, that the State has reasonable grounds to believe that the Distributors have information or may be in possession, custody or control of any document or other tangible

object relevant to a civil investigation for violation of the Antitrust Act and that the CIDs otherwise complied with the requirements of § 57-1-5 of the New Mexico Antitrust Act, NMSA 1978, (1987 Repl.)(The "Act").

The Distributors were permitted to defend and to present evidence and testimony to support their claims that the CIDs were burdensome and oppressive, were not in proper form, were unconstitutional and were issued by the Attorney General with improper motives. The Distributors subpoenaed the Attorney General's Communications Director, Kay Roybal, and one of the Attorney General's consultants, Sam Rodar, to testify at the hearing. Both Ms. Roybal and Mr. Rodar appeared, were examined and by agreement of counsel for Distributors thereafter excused. The Distributors also subpoenaed Attorney General Tom Udall, who did not appear. Following testimony by Ms. Roybal and Mr. Rodar, counsel for the Distributors indicated that the Distributors no longer needed Mr. Udall's testimony and withdrew Mr. Udall's subpoena.

Upon the State's unopposed motion, the following cases, each of which involves virtually identical issues of fact and law, were consolidated under Civil Action File No. 94-66(SQ) for all purposes by Order of December 30, 1994: *State of New Mexico v. Dial Oil Co.*, San Juan County Civil Action No. 94-593(SQ); *State of New Mexico v. Farmington Oil Company,* San Juan County, Civil Action No. 94-597 (SQ); *State of New Mexico v. Graves Oil & Butane Co.*, San Juan County, Civil Action No. 94-598 (SQ); *State of New Mexico v. Eagle Energy,*

Inc., McKinley County, Civil Action No. 94-1 (SQ); *State of New Mexico v. Indian Capitol Distributing Co.*, McKinley County, Civil Action No. 94-2 (SQ); *In re Request for Approval of Civil Investigative Demand*, Santa Fe County, Civil Action No. SF 94-147 (SQ); *Latasa Oil Company, Inc.* v. *State of New Mexico*, Socorro County, Civil Action No. CV 94-84.

Based on the foregoing, the Court finds as follows:

FINDINGS OF FACT

1. On May 31, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County pursuant to Sections 57-1-5(A) of the New Mexico Antitrust Act for Civil Investigative Demands ("CIDs") to the Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Metzger Stores, Inc., Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane Company, Latasa Oil Company, and Indian Capitol Distributing Company.

2. The First Judicial District Court approved and issued the CIDs on May 31, 1994.

3. On June 6, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County for CIDs to Berridge Distributing Company, Polk Oil Company, Dial Oil Company, Honstein Oil Company and Ross Oil Company.

4. The First Judicial District Court approved and issued these CIDs on June 7, 1994.

5. The Wilson Corporation acknowledged service of the CID by registered mail; the CID was personally served upon each of the other Distributors by sheriff.

6. The CIDs described the nature of the conduct under investigation by the State as sharp disparities in the price of gasoline from community to community and uniform price increases in certain communities, which together with other information suggests that competition may be limited to one or more levels of the gasoline industry.

7. The written interrogatories were part of the CID.

8. A copy of Section 57-1-5 of the Act was appended to the CIDs.

9. Each CID requires that it be answered within 30 days.

10. The Attorney General's office indicated in correspondence to Distributors and Distributors' counsel that if necessary the return date set in the CIDs would be extended and offered to accommodate if possible any specific problems each Distributor might have in responding to the CIDs as issued.

11. The Distributors claimed generally that the CIDs are burdensome and oppressive.

12. While it will undoubtedly take a considerable amount of time to compile the information sought by the State, the Distributors presented no evidence as to the form in which the information is currently held, whether computerized or not, the process by which it would have to be complied, the realistic number of hours compilation could be made easier, or other specific evidence supporting their claim of burdensomeness.

13. The Distributors argued that the Attorney General should pay, in advance, the cost of compliance with the CIDs.

14. The Distributors claim that the Attorney General sought the CIDs for improper purposes. They argue that the CIDs were sought in aid of the Attorney General's campaign for re-election; that they were sought with the purpose of advising the New Mexico State Legislature; and that the Office of Attorney General is being used by Sam Rodar to pursue his own personal agenda.

15. It is a fact of our electoral system that the Attorney General must run for office every four years.

16. The evidence shows that the Attorney General is investigating gasoline marketing to determine if there are any violations of the Antitrust Act.

17. The Attorney General, although a part of the Executive Branch of government, often serves as advisor to the Legislature, or to individual legislators, upon request.

18. Mr. Rodar testified to the limited role he has played in working for the Attorney General, and the circumscribed scope of work is his contract with the Attorney General verified his limited role in the investigation.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of these consolidated proceedings.

2. The CIDs state that the Attorney General believes that some gasoline marketers in New Mexico may be violating § 57-1-1 *et seq.* of the New Mexico Antitrust Act and § 57-14-3 of the New Mexico Price Discrimination Act. Price discrimination may violate the Antitrust Act. Therefore even if this reference to the Price Discrimination Act is improvident since the Price Discrimination Act contains no CID provisions, it does not affect the validity of the CID.

3. The CIDs were served on each of the Distributors in conformance with Rule 1-004 of the New Mexico Rules of Civil Procedure, as required by Section 57-1-5(A) of the New Mexico Antitrust Act.

4. The State need not describe with specificity the precise nature of the conduct under investigation, but a description of the general nature of the conduct is sufficient. To insist upon specificity at an early stage of investigation would defeat the purpose of the demand. *See Petition for Gold Bond Stamp Co.*, 221 F. Supp.391 (D.Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d. 1274 (Colo. 1985).

5. The description of the nature of the conduct under investigation contained in the CIDs, while general, satisfies the requirements of Section 57-1-5(A) of the Act.

6. The CIDs otherwise comply with the requirements of § 57-1-5(A) of the Act:

(a) The CIDs describe the class or classes of documents or objects sought with sufficient definiteness to permit them to be fairly identified.

(b) The 30-day return date set in the CIDs was reasonable, particularly in light of the fact that the State made clear that it was flexible with respect to the return date and was willing to accommodate particular problems in responding.

(c) A copy of Section 57-1-5 of the Act was appended to the CIDs.

7. No demand to produce a document or object for inspection and copying shall contain any requirements which would be unreasonable or improper if contained in

a subpoena duces tecum issued in a civil proceeding by a district court of this state.

8. The burden of demonstrating that a CID is unreasonably burdensome or otherwise improper as measured against the standards applicable to a subpoena duces tecum is upon the person contesting the CID.

9. Based upon the CIDs themselves and the presentations of the parties, I find that these CID are not unreasonably burdensome and/or oppressive.

10. The paragraph in Section 57-1-5(A) of the Act which prohibits any request for documents from containing demands which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state provides a guideline as to the permissible scope of the CID. That paragraph does not incorporate within the Act the totality of SCRA 1-045, including the payment of costs by the State.

11. The Distributors' request for costs is denied.

12. Tom Udall's investigation of gasoline marketing and other possible violations of the Antitrust Act may endear him to the general public. But the public's endorsement of his efforts, through re-election, do not without substantially more indicate an improper motive.

13. It is entirely proper for the Attorney General to advise the Legislature or individual legislators. It

would be a great and unwarranted waste of state resources if after a thorough investigation the Attorney General were not in a position to share non-confidential information with the Legislature.

14. Distributors have not shown that the CIDs were obtained for the purpose of pursuing legislation aimed at curbing gas prices.

15. The Distributors introduced no credible evidence in support of their claim that Mr. Rodar has persuaded the Attorney General to use his office to advance Mr. Rodar's personal agenda or that Mr. Rodar has in some manner orchestrated the Attorney General's investigation.

16. I find that the Distributors have not made a preliminary and substantial demonstration of abuse and improper motive, and therefore discovery to aid in these defenses to compliance with the CIDs will not be allowed.

17. The evidentiary privilege against self incrimination does not apply to, or extend to, corporations or individuals in their representative capacity. *Doe v. State*, 114 N.M. 78 (1992). There is no constitutional support for Distributors' argument that they should not be required to comply with the CIDs on the grounds that the responses thereto may tend to incriminate the corporations.

18. The Distributors' argument that the CID process in this case was constitutionally deficient because the State did not show probable cause that a violation of

the Antitrust Act has occurred is not persuasive. The cases are legion which hold that the Fourth Amendment right to be free from unreasonable searches and seizures is not implicated in the civil investigative demand process. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391, *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

19. The process for obtaining and enforcing a CID prescribed by Section 57-1-5 of the New Mexico Antitrust Act includes judicial review of the Attorney General's application for the CID.

20. In determining whether a CID satisfies constitutional requirements, the court must determine (a) that the investigation is for a lawfully authorized purpose; (b) that the information sought is relevant to the inquiry; and (c) that the CID is sufficiently specific to obtain documents which are adequate but not excessive for the industry. A CID is reasonable without probable cause if it satisfies those criteria.

21. Although Art. II, Sec. 10 of the New Mexico Constitution may provide broader protection than does the Federal Constitution in some respects, Section 57-1-5 of the New Mexico Antitrust Act and the process followed by the Attorney General in obtaining CIDs in this case conforms with the requirements of the New Mexico Constitution.

22. The Attorney General is required by Section 57-1-5(C) of the Antitrust Act to keep confidential any material produced pursuant to the Act, prior to filing an action for violations under investigation.

23. To the extent the Distributors believe they need additional protection for information provided in response to the CIDs they may pursue a motion for a protective order. However, such motions and any required motions hearings should not delay compliance with the CIDs in the interim.

24. In summation, I find that the CIDs are proper in form and that there is reasonable cause to believe that each of the Distributors has information or may be in possession, custody or control of documents or other tangible objects relevant to a civil investigation for violations of the Antitrust Act.

THEREFORE, THE COURT ORDERS as follows:

1. The State's Motions for Protective Order with respect to the Distributors' Interrogatories and Requests for Production of Documents are granted;

2. The State's Motion to Quash Subpoena Duces Tecum with respect to Sam Rodar is granted;

3. The Distributors' Motions for Summary Judgment or in the Alternative to Quash Civil Investigative Demands are denied;

4. The State's Petitions for Order requiring each of the Distributors to comply with Civil Investigative Demands are granted;

5. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Ross Oil Company, Robinson Oil Company, Colomex Oil & Gas Company, Eagle Energy, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane Company, Indian Capitol Distributing Company, Honstein Oil Company, and Latasa Oil Company shall each of them comply fully and under oath within 30 days of entry of this Order with the Civil Investigative Demands issued variously by the First Judicial District Court, Santa Fe County, on May 31, 1994 and June 7, 1994; and

6. The Court will retain jurisdiction of these cases for the propose of resolving any disputes that may arise in the course of compliance with these CIDs.

ORDERED this 26th day of April, 1995.

/s/ Peggy L. Nelson
District Judge

Approved As to Form:

/s/_____

F. Edwin Hallman, Jr., Esquire
David C. Moss, Esquire
Decker & Hallman, P.C.
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500

Robin C. Blair
P.O. Box 10
Raton, New Mexico 87740
(505) 445-2744

Paul Bardacke
Peter S. Kierst
Kerry Kiernan
Eaves, Bardacke & Baugh, P.A.
6400 Uptown Blvd., NE, Suite 110-W
Albuquerque, New Mexico 87110
(505) 888-4300

Attorneys for The Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Ross Oil Company, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane, Inc., Eagle Energy, Inc., Indian Capitol Distributing Co., Inc., Honstein Oil Company, and Latasa Oil Company

/s/_____

Susan G. White
Assistant Attorney General
Attorney for the State of New Mexico

ORDER ON REHEARING

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
June 5, 1996

NO. 23,583

THE WILSON CORPORATION, et al.,

Petitioners-Petitioners,

vs.

STATE OF NEW MEXICO, ex rel.,
TOM UDALL, ATTORNEY GENERAL,

Respondent-Respondent,.

TOM UDALL, Attorney General
of the State of New Mexico,

Petitioner-Respondent,

vs.

THE WILSON CORPORATION, et al.,

Respondents-Petitioners,

and

BERRIDGE DISTRIBUTING CO., INC.,

Intervenors-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petitioner's motion for rehearing of the order denying the petition for writ of certiorari, and the Court having considered said motion, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion hereby is DENIED.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

[AMENDMENT IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES

NEW MEXICO ANTITRUST ACT
NMSA 1978 § 57-1-1, *et seq.*

CHAPTER 57

Trade Practices and Regulations

57-1-1. Contracts, agreements, combinations or conspiracies in restraint of trade.

Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within the state, is unlawful.

57-1-1.1. Short title.

Sections 57-1-1 through 57-1-15 NMSA 1978 may be cited as the "Antitrust Act."

57-1-1.2. Definition.

As used in the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978], "person" means an individual, corporation, business trust, partnership, association or any governmental or other legal entity with the exception of the state, except as used in Subsection B of Section 57-1-3 NMSA 1978, and the United States.

57-1-2. Monopolies.

It is hereby declared to be unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, trade or commerce, any part of which trade or commerce is within this state.

57-1-3. Contracts for restraint of trade or monopoly void; civil liability of participants; injunctive relief; purchasers relieved from payment.

A. All contracts and agreements in violation of Section 57-1-1 or 57-1-2 NMSA 1978 shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by violation of Section 57-1-1 or 57-1-2 NMSA 1978 may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

B. The attorney general may bring an action under Subsection A of this section on behalf of the state, a political subdivision thereof or any public agency.

C. In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed

on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

D. For the purposes of this section, "business or property" includes business or nonbusiness purchases and business and nonbusiness injuries.

57-1-4. Organizations exempted.

The labor of a human being is not a commodity or article of commerce. No law against monopolies or combinations in restraint of trade shall be held or construed to forbid the existence and operation of natural gas marketing, labor, agricultural or horticultural organizations instituted for purposes of mutual help and not having capital stock or conducted for profit to the organization or to forbid or restrain individual members of such organizations from lawfully carrying out the objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under any law against monopolies or combinations in restraint of trade. No natural gas marketing organization exempted herein shall be organized in such a manner so as to control more than ten percent of the natural gas market. Nothing in this section shall be held or construed to justify any restraint of trade or restriction of competition except such as is incident to the protection and promotion of the interests of the members of such organizations, in view of their situation and circumstances, but such organizations and their objects and the effectuation thereof shall prima facie be presumed to be in reasonable restraint of trade or restriction of competition.

57-1-5. Attorney general; investigation.

A. If the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, he may, before bringing any action, apply to the district court of Sante Fe county for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath, or to produce the document or object for inspection and copying. The demand shall:

(1) be served upon the person in the manner required for service of process in this state, or, if the person cannot be found or does not reside or maintain a principal place of business within this state, in the manner required for service of process in the state in which the person resides, maintains a principal place of business or can be found;

(2) describe the nature of the conduct under investigation;

(3) describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified, if the production of documents or objects is requested;

(4) contain a copy of the written interrogatories, if answers to written interrogatories are sought;

(5) prescribe a reasonable time at which the person must appear to testify, within which to answer the written interrogatories or within which the document or object must be produced;

(6) specify a place for the taking of testimony or for production and designate a person who may be an authorized employee of the attorney general, to be custodian of the document or object; and

(7) contain a copy of Subsections B, D, and D of this section.

No demand to produce a document or object for inspection and copying shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this case.

The district court shall approve the demand if it finds that the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978 and that the demand is proper in form. A demand shall not be issued without approval of the district court.

B. If a person fails to comply with the written demand served upon him under the provisions of Subsection A of this section, the attorney general may file in the district court of the county in which the person resides or in which he maintains a principal place of business within this state or of the county of Sante Fe if the person neither resides nor has a principal place of business in this state a petition for an order to enforce the demand. Notice of hearing the petition and a copy of the petition shall be served upon the person, who may appear in opposition to the petition. If the court finds that the demand is proper in form and there is reasonable cause to believe that the person has information or may be in possession, custody or control of any document or other

tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, the court shall order the person to comply with the demand, subject to any modification that the court may prescribe. Upon motion by the person and for good cause shown, the court may make any further protective order in the proceedings that justice requires.

C. Prior to the filing of an action under the provisions of the Antitrust Act for the violation under investigation, any testimony taken or material produced under this section shall be kept confidential by the attorney general unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories or produced material, or disclosure is authorized by the court. All court records, including docket, application, petitions, motions and other papers filed under this section shall be open to inspection only to the attorney general and the person upon whom the demand for which inspection is sought has been served, unless otherwise ordered by the court.

D. Any person compelled to appear under this section and required to testify under oath may be accompanied, represented and advised by counsel. An objection may properly be made, received and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege.

57-1-6. Criminal penalty.

A. Any person who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be guilty of a fourth-degree felony and, for conviction thereof, if a person other than

an individual, it shall be punished by a fine not to exceed two hundred fifty thousand dollars ($250,000), or, if an individual, imprisonment in the penitentiary for a determinate term of not less than one year nor more than five years, or by the payment of a fine not to exceed fifty thousand dollars ($50,000), or both such imprisonment and fine in the discretion of the court. An indictment must be found or information or complaint must be filed within three years from the time of the violation.

B. No criminal action may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

C. For the purposes of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

57-1-7. Civil penalty.

A. The attorney general may bring an action for civil penalties in the name of the state against any person for violation of Section 57-1-1 or 57-1-2 NMSA 1978. Any individual who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be subject to a civil penalty of not more than fifty thousand ($50,000), or, if a person other than an individual, not to exceed two hundred fifty thousand dollars ($250,000).

B. Any person who fails to comply with a final judgement or decree of a court of this state issued for a violation of the Antitrust Act shall be subject to a civil penalty; if an individual, the penalty shall be not more than fifty thousand dollars ($50,000), or, if a person other

than an individual, the penalty shall be not more than two hundred fifty thousand dollars ($250,000).

C. No action for a civil penalty may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

D. For the purposes of Subsections A and B of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

57-1-8. Attorney general; injunctive relief.

The attorney general may bring an action in the name of the state against any person to enjoin, restrain and prevent the doing in this state of any act declared unlawful under Section 57-1-1 or 57-1-2 NMSA 1978.

57-1-9. Election of remedies.

The obtaining of a judgement under the Antitrust Act to assess a civil penalty against a person shall be an election of remedies to not bring a criminal prosecution against such person under the Antitrust Act. The institution of a criminal prosecution under that act against a person by filing an information or complaint or returning an indictment shall be an election of remedies not to bring suit to assess a civil penalty against such person under that act.

57-1-10. District attorneys; enforcement.

In order to promote the uniform administration of the Antitrust Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may, on a case-by-case basis, delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power and duty conferred upon the attorney general by this act. [57-1-1 to 57-1-3, 57-1-5 to 57-1-19 NMSA 1978].

57-1-11. Judgment in favor of state as prima facie evidence.

A. A final judgment or decree in a civil or criminal proceeding determining that a person has violated Section 57-1-1 or 57-1-2 NMSA 1978 in an action brought by the state is prima facie evidence against such person in any other action against him under the provisions of Section 57-1-3 NMSA 1978 as to all matters with respect to which the judgment or decree would be an estoppel between the parties thereto. This section does not affect the application of collateral estoppel or issue preclusion.

B. For the purposes of Subsection A of this section, "final judgment" or "decree" shall not include a consent judgment or decree entered before any testimony has been taken at trial in a civil proceeding or a judgment based upon a plea of nolo contendere in a criminal proceeding.

57-1-12. Limitations of actions.

A. An action brought under the provisions of Section 57-1-7 or 57-1-8 NMSA 1978 is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later.

B. An action brought under the provisions of Section 57-1-3 NMSA 1978 to recover damages is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later. Provided, however, that a cause of action is not barred if it is commenced within one year after the conclusion of a timely action brought by the state under the provisions of Section 57-1-6, 57-1-7 or 57-1-8 NMSA 1978, based in whole or in part on any matter complained of in the action for damages, whichever is later.

C. For the purposes of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation.

57-1-13. Actions involving interstate or foreign commerce.

No action under the Antitrust Act shall be barred on the ground that the activity or conduct complained of in any manner affects or involves interstate or foreign commerce.

57-1-14. Remedies cumulative.

Subject to Section 57-1-9 NMSA 1978, the remedies afforded the state under the Antitrust Act shall be cumulative.

57-1-15. Construction.

Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

57-1-16. [Lawful activities.]

Nothing contained in the Antitrust Act is intended to prohibit actions which are:

A. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and

B. actively supervised by the state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any propriety interest in the actions.

57-1-17. Limitation on recovery of damages.

A. Notwithstanding the provisions of Section 57-1-3 NMSA 1978:

(1) no damages or interest on damages may be recovered under the Antitrust Act from any local government or official or employee thereof acting in an official capacity; provided, however, that in an action for a permanent injunction brought against a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys' fees may be granted to the prevailing party; and

(2) no damages or interest on damages may be recovered under the Antitrust Act in any claim against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity; provided, however, that in an action for permanent injunction brought against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys' fees may be granted to the prevailing party.

B. As used in this section:

(1) "local government" means:

(a) a city, county or any other general function governmental unit established by state law; or

(b) a school district, sanitary district or any other special function governmental unit established by state law; and

(2) "person" has the meaning given it in Section 57-1-1.2 NMSA 1978 but does not include any local government as defined in Paragraph (1) of this subsection.

57-1-18. Limitation of purchases unlawful.

It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at the advertised price. It is further unlawful for any merchant offering or advertising any such item of merchandise in his place of business at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price.

57-1-19. [Violation of act; penalty.]

Any person convicted of violating this act [57-1-18, 57-1-19 NMSA 1978] shall be punished by a fine of not more than five hundred dollars ($500) or by imprisonment of not more than ninety days, or by both such fine and imprisonment.

Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

No. 96-328

In The

Supreme Court of the United States

October Term, 1996

THE WILSON CORPORATION, *et al.*,

Petitioners,

v.

TOM UDALL,
Attorney General of New Mexico,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

TOM UDALL
Attorney General
Counsel of Record

MANUEL TIJERINA
Deputy Attorney General
JOHN B. HIATT
Director, Consumer Protection Division
SUSAN G. WHITE
JEROME MARSHAK
Assistant Attorneys General
Office of the Attorney General of New Mexico
6301 Indian School Road, N.E.
Suite 400
Albuquerque, New Mexico 87110
(505) 841-8094

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New Mexico, *ex rel.* Tom Udall, Attorney General ("State"), respectfully requests that this Court deny the petition for writ of certiorari submitted on behalf of The Wilson Corporation, Colomex Oil & Gas Co., Ross Oil Co., Robinson Oil Co., Berridge Distributing Co., Inc., Metzger Stores, Inc., Polk Oil Co., Dial Oil Co., Eagle Energy, Inc., Farmington Oil Co., Graves Oil & Butane Co., Inc., Honstein Oil Co., Indian Capital Distributing Co. and Latasa Oil Co. (collectively "Distributors") on 27 August 1996, seeking review of the Opinion of the Court of Appeals of the State of New Mexico reported at 916 P.2d 1344 (1996), *cert. denied*, 916 P.2d 844 (N.M. 1996), *rehearing denied*, on 5 June 1996 in an unreported order.

JURISDICTION

The New Mexico Court of Appeals decided state constitutional and state statutory issues, not federal questions. Distributors claim in their Petition that the question presented to this Court "arises from the Opinion of the New Mexico Court of Appeals dated March 19, 1996," wherein that court erroneously, Distributors say, held that "[i]f the Attorney General makes the necessary showing, the person challenging the CID bears the burden of establishing some impropriety in the CID, such as the *absence of a* proper purpose for the CID. . . . " (Emphasis by Distributors; Petition for Certiorari, at p. 4, quoting the Opinion of the Court of Appeals, ¶ 16; Appendix, at pp. 15-16). To the extent this is the Court of Appeals' holding

at all, it is an assignment of burden of proof and a decision about procedure – which comports in every respect with this Court's decision in *United States v. Powell*, 379 U.S. 48, 58 (1964) ("The burden of showing an abuse of the court's process is on the taxpayer").

Distributors state further that the Court of Appeals held that civil investigative demands ("CIDs") should not be quashed unless the Attorney General's only purposes were improper (Petition, at p. 4). This, however, was not the Court of Appeals' holding in the decision Distributors ask this Court to review. See the Court of Appeals' Opinion below, ¶ 2 (Appendix, at p. 4), noting that in an earlier related decision in *Brewer Oil Co. v. State of New Mexico*, 121 N.M. 106, ___, 908 P.2d 799, 801-803 (Ct. App. 1995), *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995) ("*Brewer Oil*"), it had reversed the district court's ruling that the Attorney General had an improper purpose in seeking the CIDs, "holding that (1) the CIDs could be quashed only if the *sole* purpose of the Attorney General was an improper one and (2) the undisputed facts before the district court did not compel the inference that the sole purpose of the Attorney General was improper" (emphasis in the original).

Thus the question presented to this Court was decided nearly a year ago in the Court of Appeals' decision in *Brewer Oil, supra*. Distributors could not have been surprised when the same court relied on its holding in *Brewer Oil* in determining that Distributors had failed to establish that the Attorney General had no proper purpose in seeking the CIDs and that the CIDs therefore should not be quashed on those grounds.

What the Court of Appeals did hold with respect to the question presented to this Court was squarely an evidentiary holding, based upon New Mexico state practice and precedent:[1]

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[1] Distributors ask the Court to review the Opinion and Order of the Eighth Judicial District Court of the State of New Mexico, not the final judgment or decree rendered by New Mexico's highest court in which a judgment could be had (Petition, at p. 1). This error reflects the jurisdictional flaw in Distributors' Petition, that is Distributors' failure to preserve any federal questions upon which New Mexico's highest court could render an opinion or judgment.

In the District Court, Distributors argued *inter alia* that the CIDs issued by the First Judicial District Court upon the Attorney General's application violated the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico State Constitution because the State had not made a "probable cause" showing. The District Court held that the CID provisions of the New Mexico Antitrust Act and the process followed by the State in obtaining the CIDs at issue here did not offend either the federal constitution or the state constitution. See the District Court's Decision and Order entered 26 April 1995, Conclusions of Law ¶¶ 18, 20, 21; Appendix to Petition at pp. 57-58.

Distributors could have appealed the District Court's Decision and Order on both federal and state constitutional grounds – but they did not. Their argument to the Court of Appeals was that the New Mexico state constitution provides greater protection to CID recipients than does the United States Constitution.

Thus, Distributors abandoned the federal constitutional issues decided by the trial court in the Court of Appeals. Distributors did not list any federal statutory or constitutional issues in their Docketing Statement to the Court of Appeals, nor did they brief any federal questions to the Court of Appeals. Distributors did not list the United States Constitution in the Table of Authorities in either their Brief in Chief or their Reply

> Without detailing the evidence at the hearing, we hold that the evidence presented by the Marketers was not so compelling that every rational person would necessarily have determined that the only purposes of the Attorney General were improper ones.

Opinion, ¶ 24; Appendix, at p. 20.

STATEMENT OF THE CASE

1. The Nature of the Case

The cases consolidated below are 11 of some 31 cases pending in various states of progress in district courts all over New Mexico – all virtually identical with respect to the legal and factual issues raised. Each involves a CID issued pursuant to Section 57-1-5 of the New Mexico Antitrust Act, NMSA 1978 (1995 Repl.) ("Antitrust Act"), to a company engaged in buying and selling gasoline in New Mexico. But for the vigor with which Distributors have resisted complying with the CIDs, there is nothing exceptional about this matter.

2. Proceedings Below

Stripped of argument, the proceedings below can be summarized in pertinent part as follows. In late May and early June, 1994, the Attorney General applied to the First

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Brief to the Court of Appeals, much less raise for the Court of Appeals' consideration any of the federal constitutional issues argued to the trial court. Accordingly, the Court of Appeals did not decide any federal questions.

Judicial District Court of New Mexico pursuant to the investigatory provisions of the Antitrust Act for CIDs against Distributors, among others. The CIDs were issued in the form sought. Each of Distributors declined to comply with the CIDs.

The State petitioned for orders requiring compliance with the CIDs by each of the Distributors involved in these consolidated cases and each of the Distributors petitioned for declaratory judgment seeking orders quashing the CIDs on numerous grounds, although their improper purpose claim was not among them. The State moved to dismiss the declaratory judgment actions on the grounds, among others, that Distributors had a full and adequate remedy in the enforcement actions filed by the State. The District Court dismissed the petitions for declaratory judgment on 15 March 1995.[2]

Each of Distributors also filed papers styled Motions for Summary Judgment, which included so-called "Statements of Material Facts as to Which No Genuine Issue Exists ('SMFs')." In support of the so-called Statements of

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[2] Distributors have included the District Court's Order dismissing their Petitions for Declaratory Judgment in the Appendix, to what end is not clear. Although they included the district court's dismissal of their Petitions for Declaratory Judgment as an issue in their Docketing Statement to the Court of Appeals, they did not mention the issue in their briefs. Under New Mexico Rules of Procedure, they thereby abandoned the issue for appellate purposes. *State v. Fish*, 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct. App. 1985), *cert. denied*, 102 N.M. 734, 700 P.2d 197 ("Other issues listed in the docketing statement but not briefed are deemed abandoned"). Neither issues raised exclusively in the Declaratory Judgment actions nor dismissal of those actions by the District Court are before this Court.

Material Facts relating to their improper purpose allegations, Distributors attached a lengthy report released by the Attorney General in May 1994 entitled *Gasoline Pricing and Marketing in New Mexico, an Interim Report ("Interim Report")* – the same report from which Distributors have selectively quoted to this Court (Petition, at pp. 11-12).

The *Interim Report* simply does not demonstrate lack of proper purpose as urged by Distributors. For example, the beginning of the paragraph from which Distributors quoted at the bottom of page 11 of their Petition states:

> Given these interim conclusions, our investigation is presently focusing on the questions raised above. We will be endeavoring first of all to determine whether there are violations of the antitrust laws, in the form of price fixing (overt or tacit), or in the form of anticompetitive price discrimination or other anticompetitive behavior. If we find violations of the presently existing antitrust laws, we have the ability to prosecute such violations. . . .

Interim Report, Introduction, at p. 3; Record Proper 1927 ("RP ___"). Adopting Distributors' view of the record would have required the District Court to accept as true a handful of statements contained in a hundred-page report, while rejecting as false the significantly greater balance of the report. Neither the trial court below, nor the Court of Appeals was willing to do this. See *infra*, at p. 15.

Contrary to Distributors' assertion that the State "failed to respond to the SMFs" (Petition, at p. 6), the State responded in oppostion to Distributors' Motions for

Summary Judgment. See, for example, the State's Response in Opposition to the Motion for Summary Judgment or in the Alternative to Quash Civil Investigative Demands of Berridge Distributing Company, Inc., Metzger Stores, Inc. and Polk Oil Company, filed in the District court on 20 September 1994 (RP 447-581).[3]

The District Court held a hearing on 16 November 1994 at which Distributors were permitted to be heard and to introduce evidence in support of their objections to the CIDs. Briefing continued in cases in other courts, which cases were consolidated by consent with the proceeding below in December 1994. In addition, the record was supplemented by both the State and Distributors following the November 1994 hearing. The State submitted Affidavits of the Attorney General and the State's economist, Professor Alfred Parker, and Distributors submitted an Affidavit from their economist, Dr. Allen Parkman. Distributors also submitted the entire hearing transcript from a subsequent proceeding in another New Mexico state district court involving different distributors but virtually identical issues and arguments.

On 23 February 1995, the District Court entered its Decision and Order requiring compliance with the CIDs. The District Court entered a second Decision and Order

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[3] The State responded generally that all but six of the allegations contained in Distributors' statement of allegedly undisputed material facts were either incorrect, immaterial or no more than conclusory assertions of opinion or law (RP 449, 453). The State then showed *seriatim* how each of the various allegations was either false, immaterial or conclusory opinion and not "material fact" (RP 449-458).

on 26 April 1995 following rehearing, revised as to form but not substance, enforcing the CIDs, from which Distributors appealed.

REASONS THE PETITION SHOULD BE DENIED

The question presented by Distributors for the Court's consideration garbles two separate issues. The first is reasonably clear: Does the New Mexico Court of Appeals' holding in an earlier related case that CIDs issued pursuant to Section 57-1-5 of the Antitrust Act, may be quashed only if the Attorney General's sole purpose in applying for them was an improper one conflict with the good faith requirements set out by this Court in *United States v. Powell,* 379 U.S. 48 (1964)? As discussed *infra,* the answer to this question is clearly no. The Court of Appeals' Opinion is entirely consistent with *United States v. Powell, supra,* and all of the cases succeeding it.

The second issue is significantly less clear but appears to be whether an unsupported allegation that the Attorney General applied for CIDs in aid of an investigation for antitrust violations is sufficient to demonstrate that he had a proper purpose in doing so. The problem with this second issue is that it misrepresents the factual record in the courts below. As discussed *infra,* the record below contains two Affidavits by the Attorney General stating that his purpose in instituting his investigation into gasoline marketing in New Mexico was to determine whether high gasoline prices are the product of antitrust violations. In effect, with respect to this second issue,

Distributors seek an impermissible advisory opinion from the Court.

Distributors' question thus is predicated on two assumptions, neither of which is correct.

1. Distributors misstate the law as set out in *United States v. Powell*

Distributors assert that the good faith requirements set out by the Court in *United States v. Powell, supra,* include "(1) the investigation has a legitimate purpose; (2) the inquiry is relevant to the purpose; (3) the information sought is not already in the [requesting party's] possession; and (4) the investigation is not being conducted for *an* improper purpose; and (5) the statutorily required administrative steps have been followed" (Petition, at p. 14; emphasis by Distributors). Distributors' fourth requirement – "the investigation is not being conducted for *an* improper purpose" – has been added to the list by Distributors.

The good faith requirements outlined by this Court in *Powell* were in fact four, not five:

> [The IRS Commissioner] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed.

379 U.S. at 58. *See also United States v. Stuart,* 489 U.S. 353, 359 (1989) (quoting *Powell*). Moreover, each of the United States Courts of Appeal cited by Distributors in support

of their argument formulated the good faith requirement set out in *Powell* as having four parts, not the five created by Distributors. *United States v. Lask*, 703 F.2d 293, 296 (8th Cir. 1983), *cert. denied*, 464 U.S. 829 ("These [*Powell*] standards are four: . . . "); *La Mura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985) (quoting four *Powell* standards); *United States v. MacKay*, 608 F.2d 830, 832 (10th Cir. 1979) (quoting four *Powell* standards). *See also United States v. Beacon Federal Savings & Loan*, 718 F.2d 49, 52 (2d Cir. 1983) ("Once the government makes a sufficient preliminary showing for enforcement, the burden shifts to the taxpayer to disprove one of the four *Powell* criteria . . . ").

2. The opinion of the New Mexico Court of Appeals is entirely consistent with other courts which expressly reached the issue raised by Distributors

In the Opinion below, the Court of Appeals noted its holding in its earlier decision in *Brewer Oil, supra*, 121 N.M. at ___, 908 P.2d at 801-803, that the CIDs could be quashed only if the Attorney General's sole purpose in obtaining them was an improper one, and held that the Distributors had not met their burden of demonstrating to the trial court that the Attorney General was motivated solely by improper purposes in seeking the CIDs. Court of Appeals' Opinion, ¶¶ 23, 24; Appendix at pp. 19-20.

In holding that the CIDs must be enforced so long as they were issued for a proper purpose, the Court of Appeals' decision was entirely consistent both with this Court's decisions in *United States v. Powell, supra, Donaldson v. United States*, 400 U.S. 517, 534-35 (1971), and

United States v. LaSalle National Bank, 437 U.S. 298, 316 (1978) ("those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service"), and with the lower courts which have squarely reached this issue. *See, e.g., McVane v. Federal Deposit Insurance Corp.*, 44 F.3d 1127 (2d Cir. 1995) ("Even if the Directors can show that one purpose underlying the subpoenas is improper, enforcement of the subpoenas is called for nonetheless so long as other, proper purposes exist"); *Environmental Protection Agency v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 447 (9th Cir. 1988) (administrative subpoenas should be enforced if the evidence sought is not plainly incompetent or irrelevant to any lawful purpose of the agency); *Federal Trade Commission v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980) ("even if an improper purpose by an agency or member of the staff is shown, enforcement of the subpoena is called for so long as proper purposes exist as well"); *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 909 (7th Cir. 1978), *cert. denied*, 439 U.S. 959 (" . . . the Comptroller General's investigation is motivated by at least one legitimate purpose and therefore is a proper investigation under principles of administrative law"); *Lynn v. Biderman*, 536 F.2d 820, 826 (9th Cir. 1976), *cert. denied*, 429 U.S. 920 ("It is not, however, a ground to deny enforcement of a subpoena that it is being employed for a wrongful purpose if there is also a legitimate purpose for the subpoena").

3. The question presented by Distributors misstates the factual record developed in the courts below

Distributors ask this Court to decide whether a CID may be enforced "on the mere allegation that a single proper purpose to use the CIDs is present, regardless of the presence of multiple improper purposes" (Petition, Question Presented). This question is based upon two false assumptions: (1) that the CIDs at issue were enforced without any demonstration of proper purpose and (2) that Distributors in fact proved "multiple improper purposes."

Conspicuously missing from Distributors' recitation of either the course of proceedings in the New Mexico courts or Distributors' Summary of the Facts Relevant to the Issues Presented for Review is so much as a passing reference to the Attorney General's Affidavits concerning his purpose in instituting this investigation. These Affidavits are in the record below, attached both to correspondence to the District Court and to the State's Response in Opposition to Latasa Oil Company's Motion for Summary Judgment filed on 30 December 1994 (RP 1315, 1648). It is the Attorney General's sworn statement that his "purpose in instituting this investigation was to determine whether high prices in this state are the product of conduct violating the antitrust laws" (Affidavit, ¶ 12; Appendix B, at 17a).

Thus neither the District Court, nor the Court of Appeals in affirming the District Court, based its determination that the CIDs were properly issued in aid of an antitrust investigation on a "mere allegation" of proper purpose. The findings concerning the State's purpose in

obtaining the CIDs were based *inter alia* upon the Affidavit testimony of the Attorney General.

Numerous courts have found such affidavit testimony sufficient to establish proper purpose in the absence of compelling evidence showing otherwise. *See, e.g., McVane v. Federal Deposit Insurance Corp.*, 44 F.3d 1127 (2d Cir. 1995), citing *United States v. Stuart*, 489 U.S. 353 (1989) ("An affidavit from a government official is sufficient to establish a *prima facie* showing that these requirements have been met"); *La Mura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985) ("the IRS can satisfy this burden [of demonstrating good faith] merely by presenting the sworn affidavit of the agent who issued the summons attesting to these facts"); *United States v. Davis*, 636 F.2d 1028, 1034 (5th Cir. 1981) ("this showing may be made by a simple affidavit").[4]

Distributors posit "the presence of multiple improper purposes." Distributors have been arguing vigorously for more than two years that the State is engaged in the challenged investigation for numerous improper purposes. In the District Court they alleged that the CIDs were sought in aid of the Attorney General's campaign for re-election; that they were sought with the purpose of advising the New Mexico State Legislature; and that the

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[4] Distributors took the position in the Court of Appeals that the Attorney General's Affidavits could not be considered because they were introduced after the 16 November 1994 hearing took place. As the Court of Appeals observed, this argument appears to be based on the mistaken view that the CID enforcement proceeding was in the nature of an evidentiary trial instead of the summary proceeding intended. Court of Appeals' Opinion, ¶¶ 17-23, Appendix, at pp. 16-19).

Office of the Attorney General was being used by a consultant to pursue his own personal agenda (26 April 1995 Decision and Order, Findings of Fact ¶ 14; Appendix, at p. 53).

The New Mexico courts were not persuaded by Distributors' "evidence" of such "multiple improper purposes." After a hearing, the District Court concluded that Distributors had not shown that the Attorney General was using the CIDs to aid in his re-election; that Distributors had not shown that the CIDs were obtained for the purpose of pursuing legislation aimed at curbing gas prices; and that Distributors introduced no credible evidence in support of their claim that the consultant had persuaded the Attorney General to use his office to advance his personal agenda (26 April 1995 Decision and Order, Conclusions of Law ¶¶ 12-16; Appendix, at pp. 56-57).

Indeed, the District Court determined that Distributors' "evidence" was insufficient to warrant permitting discovery against the State on those issues. The trial judge's determination with respect to the purpose for which the CIDs were sought is one of fact and should not be overturned unless it is clearly erroneous. *La Mura v. United States*, 765 F.2d 974, 981 n. 10 (11th Cir. 1985). In the face of the Attorney General's uncontroverted sworn affidavit concerning his purpose in instigating the investigation, the trial judge's determination that the Attorney General is engaged in an antitrust investigation is more than adequately supported by the record. Moreover, it has been established for many years that this Court does not sit to retry issues of fact heard and determined by the

properly constituted tribunals of the state having jurisdiction of the subject. *See, e.g., Lloyd A. Fry Roofing Co. v. Wood,* 344 U.S. 157, 161 (1952) ("There are no exceptional circumstances of any kind that would justify us in rejecting the [state] Supreme Court's findings; they are not without factual foundation, and we accept them"); *Portland Railway, Light and Power Co. v. Railroad Commission,* 229 U.S. 397, 412 (1913).

Moreover, in an earlier case involving identical allegations and virtually identical facts – reference to which is also conspicuously missing from Distributors' Petition – the Court of Appeals reversed a summary judgment against the State by the Fifth Judicial District Court of New Mexico on grounds that Distributors had shown an improper purpose, stating: "the statements in the Interim Report fall short of establishing beyond genuine dispute that there was any improper purpose for the CIDs, much less that the only purposes were improper." *Brewer Oil, supra,* 121 N.M. at ___, 908 P.2d at 802 (Slip Op., at p. 6; Appendix A, at 9a). In short, the New Mexico courts found a proper purpose based on the Attorney General's sworn statement and "mere" allegations of multiple improper purposes, not a "mere allegation" of proper purpose juxtaposed against proven "multiple improper purposes" as implied by Distributors.

Distributors have misstated the factual record in other ways as well. They claim there was evidence in the record "of retribution by the Attorney General against Petitioners who are his political adversaries" (Petition, at p. 15). This claim is flatly false – and in any event not properly before this Court. The district court made no findings relating to such an allegation; Distributors did

not except to the district court's silence with respect to such a claim; the Court of Appeals never addressed such an allegation.

Distributors asserted that the State admitted, through counsel, at a hearing in related cases before yet another New Mexico District Court that "no probable or reasonable cause existed to believe that a violation of the New Mexico Antitrust Act had occurred at the time he filed applications for CIDs" (Petition, at p. 12). This assertion is both irrelevant to the issue presented to this Court and false, as well, as the transcript of that hearing shows. What the State "admitted" was that counsel had not attempted to demonstrate any probable or reasonable cause to the court since the Antitrust Act does not require the Attorney General to make such a showing in support of his application for a CID (Tr. of 23 Nov. 1994 hearing in *Bar-F Enterprises, Inc. et al. v. State of New Mexico,* Dona Ana County Case No. CV-94-673, at 138; Exh. A to Distributors' Supplement to the Record filed in the District Court on 2 February 1995 (RP 2148).

Distributors claim that counsel for the State "passed" the opportunity to introduce evidence at the hearing in this matter (Petition, at p. 9, and again at p. 15). In quoting State's counsel's statement about "passing," Distributors take counsel's comment out of context and thereby misrepresent the record below. See transcript of 16 November 1994 hearing, at 11, 14-15.[5] Along this line,

---

[5] What the State's counsel "passed" on – because the CIDs could speak for themselves in this regard – was describing for the court how each and every one of the CID requests described the documents sought with sufficient particularity to permit them to be identified.

Distributors also claim that the Attorney General never "proved" that CIDs existed and had been issued and served (Petition, at pp. 10-11). As the record below shows, and as the Court of Appeals found, Distributors admitted these facts in their Answers to the State's petitions to compel compliance. Neither New Mexico practice nor federal practice require a party to prove facts conceded by the opposing party in its pleadings (Court of Appeals' Opinion, ¶ 21; Appendix at p. 18).

CONCLUSION

For the reasons above, Distributors' petition for a writ of certiorari is entirely without merit and should be denied.

Respectfully submitted,

TOM UDALL
Attorney General
Counsel of Record

MANUEL TIJERINA
Deputy Attorney General
JOHN B. HIATT
Director, Consumer Protection Division
SUSAN G. WHITE
JEROME MARSHAK
Assistant Attorneys General
Office of the Attorney General of New Mexico
6301 Indian School Road, N.E.
Suite 400
Albuquerque, New Mexico 87110
(505) 841-8094

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

BREWER OIL COMPANY, QUEEN OIL AND GAS COMPANY, BELL GAS, INC., A-DOC OIL COMPANY, AND KW FUELS, INC.,

Petitioners/Cross-Respondents-Appellees,

vs.

THE STATE OF NEW MEXICO by and through the ATTORNEY GENERAL for the State of New Mexico, THOMAS S. UDALL,

Respondent/Cross-Petitioner-Appellant.

No. 16,196

(Filed Nov. 9, 1995)

APPEAL FROM THE DISTRICT COURTS OF
EDDY, CHAVES, AND LEA COUNTIES
JAMES L. SHULER, District Judge

F. EDWIN HALLMAN, JR.
DAVID C. MOSS
DECKER & HALLMAN
Atlanta, Georgia

PAUL BARDACKE
PETER S. KIERST
KERRY C. KIERNAN
EAVES, BARDACKE & BAUGH, P.A.
Albuquerque, New Mexico

Attorneys for Petitioners/
Cross-Respondents-Appellees

TOM UDALL, Attorney General
JEROME MARSHAK,
Assistant Attorney General
Santa Fe, New Mexico
SUSAN G. WHITE,
Assistant Attorney General
Albuquerque, New Mexico

Attorneys for Respondent/
Cross-Petitioner-Appellant

OPINION

HARTZ, Judge.

1. The Attorney General appeals the district court's entry of a summary judgment quashing five civil investigative demands (CIDs). The only question to be resolved is whether the record before the district court established beyond genuine dispute that the Attorney General had no proper purpose for seeking the CIDs. Because we answer in the negative, we reverse and remand to the district court for further proceedings.

BACKGROUND

2. The New Mexico Antitrust Act, NMSA 1978, §§ 57-1-1 to -15 (Repl. Pamp. 1995), authorizes the Attorney General to apply to the Santa Fe County district court for approval of CIDs that require the recipients to submit to examination under oath or to produce items for inspection and copying. To obtain a CID directed to a particular person, the Attorney General must have "reasonable cause to believe that [the] person has information or may be in possession, custody or control of any document or

other tangible object relevant to a civil investigation for violation of [the Antitrust Act]." Section 57-1-5(A). Prior to the filing of an action for violation of the Act, the Attorney General must keep the testimony or material confidential "unless [1] confidentiality is waived by [a] the person being investigated and [b] the person who has testified, answered interrogatories or produced material, or [2] disclosure is authorized by the court." Section 57-1-5(C).

3. In May and June 1994 the Santa Fe County district court issued CIDs to the five gasoline marketers (collectively referred to as the Marketers) who are the petitioners in this case. The Attorney General's applications for the CIDs stated that each of the Marketers possessed information relevant to a civil investigation under the Antitrust Act and alleged that gasoline price and market data suggested that segments of the gasoline industry may be violating the Act. In August and September 1994 the Marketers filed petitions for declaratory judgment in the Fifth Judicial District seeking a determination that the CIDs were unlawful and should be quashed. The Attorney General cross-petitioned for orders requiring the Marketers to comply with the CIDs. The five suits were consolidated in Eddy County district court.

4. On November 17, 1994 the district court conducted a hearing on the Marketers' motions for summary judgment. Two weeks later the district court entered an order granting the motions, stating that the order was "based upon the uncontested proof that the [Attorney General] has conducted an investigation under [the Antitrust Act]

for an improper purpose and intends to use the information elicited in the investigation for impermissible purposes."

DISCUSSION

5. First, to avoid confusion we note that the ground for quashing the CIDs was not the lack of evidence of a violation of the Antitrust Act. Under Section 57-1-5 it is necessary only that the Attorney General be conducting a civil investigation to determine whether the Antitrust Act has been violated and that there be reasonable cause to believe that the recipient of the CID has information or materials relevant to the investigation. *See Material Handling Inst. v. McLaren*, 426 F.2d 90 (3d Cir.) (CID obtained by justice department), *cert. denied*, 400 U.S. 826 (1970); *F.T.C. v. Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992) (CID obtained by FIC), *cert. denied*, 113 S. Ct. 1255 (1993); *cf.* NMSA 1978, § 57-1-15 (Repl. Pamp. 1995) (New Mexico Antitrust Act "shall be construed in harmony with judicial interpretations of the federal antitrust laws"). This statutory standard appears to be essentially the same standard that generally applies to investigative subpoenas. *See In re Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n*, 91 N.M. 516, 517, 577 P.2d 414, 415 (1978) ("[T]he inquiry must be within the authority of the agency[,] the demand must not be too indefinite[,] and the information must be reasonably relevant to the purpose of the investigation.").

6. Instead, the basis for the quashing of the CIDs was the impropriety of the Attorney General's purpose. We agree that if the Attorney General obtains a CID without

having the purpose of pursuing a civil investigation for possible violations of the Antitrust Act, then the CID is improper and should be quashed. *See Chattanooga Pharmaceutical Ass'n v. United States Dep't of Justice*, 358 F.2d 864 (6th Cir. 1966). Quashing the CID is permissible, however, only if improper purposes are the exclusive purposes of the Attorney General. If the Attorney General also has a proper purpose, the CID is lawful. *See Donaldson v. United States*, 400 U.S. 517, 532-36 (1971); *In re McVane*, 44 F.3d 1127, 1139 (2d Cir. 1995); *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 909-10 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978); *Lynn v. Biderman*, 536 F.2d 820, 826 (9th Cir.), *cert. denied*, 429 U.S. 920 (1976); *F.T.C. v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980). Of course, protective orders are appropriate to prevent use for an improper purpose of information obtained by a CID. *See Lynn*, 536 F.2d at 826-27.

7. In the present case the Attorney General's purpose in seeking the CIDs was determined on summary judgment. The procedural setting for the determination is critical to our resolution of the appeal. Summary judgment is granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." SCRA 1986, 1-056(C) (Repl. 1992); *see Richardson v. Glass*, 114 N.M. 119, 122, 835 P.2d 835, 838 (1992). The moving party must submit a memorandum which sets out "a concise statement of all of the material facts as to which the moving party contends no genuine issue exists." SCRA 1-056(C). Each fact must "refer with particularity to those portions of the record upon which the moving party relies." *Id.* If the opposing party does not specifically controvert a fact set forth in

the moving party's memorandum, the fact "shall be deemed admitted." *Id.; see Richardson,* 114 N.M. at 122, 835 P.2d at 838.

8. The Marketers' briefs in support of their motions for summary judgment recited 29 facts (Facts) about which they claimed there was no genuine issue. They attached affidavits and other documents upon which they relied as support for their Facts. The supporting document relevant to the issues on this appeal is their Exhibit 1, a report by the Attorney General entitled "Gasoline Pricing and Marketing in New Mexico/An Interim Report/May 1994." The Marketers incorporated the Interim Report by reference into their memoranda in support of their motions for summary judgment.

9. On appeal the Marketers contend that "[t]he uncontested facts demonstrate that the Attorney General was attempting to influence the free-market economy by collecting information under the guise of CIDs, which would eventually be used to formulate legislation designed to fix and lower the price of gasoline." They rely on their Facts 26 through 29, which state:

> (26)
>
> The Attorney General's opinion is that "persistently oligopolistic markets with high barriers to entry may be of concern even where there is no identifiable illegal conduct occurring and it may be desirable for the state to intervene in such markets and attempt through regulation or other means to encourage greater competition." *See,* Exhibit 1, page 77.

(27)

Further, "[t]he Attorney General's staff will carefully review legislation enacted in other states intended to foster increased competition in gasoline markets and decrease retail gasoline prices and consider legislative solutions to the problem." *See,* Exhibit 1, page 78.

(28)

The Attorney General is attempting to influence the free-market economy of New Mexico by obtaining confidential financial information under the guise of a CID. *See,* Exhibit 1, page 78.

(29)

The Attorney General has stated that:

> We must remember that consumers and members of the gasoline industry are all citizens entitled to the protection of the laws. If there are provable antitrust violations being committed, we are committed to putting a stop to them. But if there are no such violations, and the question becomes one of deciding as a community what action should be taken to deal with high prices in a particularly vital industry, that will be a question this office cannot answer by itself. We do hope that our intensive study of this industry's pricing behavior will, when it is completed, supply the kind of detailed and sophisticated information which will be needed to deal with these issues.

See, Exhibit 1, pages 3 and 4 of the Introduction.

10. In response to the Marketers' motions for summary judgment, the Attorney General did not specifically controvert any of these four recited Facts. Rather than submitting a prehearing affidavit asserting a proper purpose for the CIDs (which would have precluded the summary Judgment and avoided the resulting delay), the Attorney General responded simply that "[Facts] numbered 11 through 27 contain allegations, some of which may be true and others of which are false, none of which are material to issues before this Court."

11. Perhaps Facts 26 through 29 read in isolation would establish that the Attorney General's sole purpose in seeking the CIDs was an improper one. But because those Facts rely upon the Interim Report as authority and because the Interim Report is incorporated into the Marketers' memoranda in support of their motions for summary judgment, we must examine the Interim Report as a whole to determine whether the only reasonable conclusion that one can draw from it is that the CIDs were sought for an improper purpose. Our review of the Interim Report reveals that it does not necessarily establish an improper purpose for the CIDs.

12. To be sure, the Interim Report recognizes the possibility that there have been no antitrust violations with respect to the marketing of gasoline, and it suggests that the Attorney General may seek legislation to regulate the market. The Interim Report also states that information acquired by the Attorney General may be used to support such a legislative effort. The marketers infer that the Attorney General is not interested in pursuing violations of the Antitrust Act but is simply seeking information to

support his legislative agenda. Nevertheless, the statements in the Interim Report fall short of establishing beyond genuine dispute that there was any improper purpose for the CIDs, much less that the only purposes were improper.

13. There are two reasons why the inference drawn by the Marketers is not compelled by the Interim Report. First, the Interim Report makes no mention of CIDs. It indicates that the Attorney General had been collecting data by other means for some time. The Marketers do not suggest that it would be unlawful for the Attorney General to use that data to support a legislative agenda. Although one might conclude that the Attorney General would also use any information obtained by CIDs to support a legislative agenda, one could equally presume that the state's highest law-enforcement official would not use information obtained by CIDs for a purpose contrary to law. In other words, a reasonable person reading the Interim Report would not necessarily conclude that the information to be used by the Attorney General for his legislative agenda would include data acquired through CIDs. When it is reasonable to draw two (or more) contrary inferences from undisputed facts, the choice of inference cannot be made on summary judgment. *See National Excess Ins. Co. v. Bingham*, 106 N.M. 325, 328, 742 P.2d 537, 540 (Ct. App. 1987).

14. Second, the Interim Report's concession that there may be no Antitrust Act violations in the New Mexico gasoline market does not compel the inference that the Attorney General is not pursuing a legitimate civil investigation to determine whether such violations exist. As noted above, it is appropriate for the Attorney General to

seek a CID despite the absence of any certainty that a violation of the Antitrust Act has occurred or is occurring. The introduction to the Interim Report states: "We will be endeavoring first of all to determine whether there are violations of the antitrust laws." If the statement is true, one can infer a proper purpose for the CIDs. The statement may be false, but its falsity cannot be decided on a motion for summary judgment.

15. We have also reviewed the transcript of the hearing on the motions for summary judgment. We find no concession by the Assistant Attorney General attending the hearing that the CIDs had no proper purpose.

16. In short, we hold that the present record cannot sustain a summary judgment quashing the CIDs on the ground that the Attorney General's purpose in seeking the CIDs was improper. The Marketers are, of course, not foreclosed from seeking a determination on this issue on the merits, after a full evidentiary hearing, nor are they foreclosed from pursuing other grounds for quashing the CIDs. In addition, they may seek protective orders to maintain the confidentiality of information obtained by the CIDs. We need not decide at this juncture the circumstances under which disclosure may be authorized by a court pursuant to Section 57-1-5(C). The statute itself fails to provide any substantive guidelines governing disclosure. Until there has been a judicial determination regarding when disclosure is authorized, it would be advisable for the Attorney General to segregate any material acquired through CIDs from information otherwise acquired.

17. For the above reasons, we reverse the summary judgment issued by the district court and remand for further proceedings consistent with this opinion.

18. **IT IS SO ORDERED.**

/s/ Harris L. Hartz
HARRIS L. HARTZ, Judge

WE CONCUR:

/s/ Benny E. Flores
BENNY E. FLORES, Judge

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

APPENDIX B

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

TOM UDALL, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, Respondent. BERRIDGE DISTRIBUTING CO., INC., *et al.*, Intervenors and Cross-Petitioners,	(Filed Dec. 30, 1994) Civil Action No. 94-66(SQ) No. 94-64 CV 94-72 CV 94-186 CV 94-187 CV
LATASA OIL COMPANY, INC., Petitioner, v. STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Respondent. and STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Cross-Petitioner,	Civil Action No. CV 94-84 Consolidated With No. 94-66(SQ)

v.)
LATASA OIL COMPANY, INC.,)
)
Cross-Respondent.)

RESPONSE OF THE STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL IN OPPOSITION TO LATASA OIL COMPANY'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO QUASH A CIVIL INVESTIGATIVE DEMAND

EXHIBIT E

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

TOM UDALL, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, Respondent. BERRIDGE DISTRIBUTING CO., INC., *et al.*, Intervenors and Cross-Petitioners,	Civil Action No. 94-66(SQ) No. 94-64 CV 94-72 CV 94-186 CV 94-187 CV Consolidated with No. 94-66(SQ)
LATASA OIL COMPANY, INC., Petitioner, v. STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Respondent. and STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Cross-Petitioner,	Civil Action No. CV 94-84 Consolidated With No. 94-66(SQ)

v.)
LATASA OIL COMPANY, INC.,)
Cross-Respondent.)

AFFIDAVIT OF TOM UDALL

STATE OF NEW MEXICO)
) ss:
COUNTY OF SANTA FE)

I, TOM UDALL, being first duly sworn, depose and state as follows:

1. I have been the duly elected Attorney General for the State of New Mexico since January 1991.

2. I have personal knowledge concerning the circumstances surrounding the decision made by this office to institute an investigation for violations of Sections 57-1-1 and 57-1-2 of the New Mexico Antitrust Act, NMSA (1987 Repl.) in the gasoline industry in New Mexico and the development and progress of that investigation to date.

3. During April 1993, my office received numerous and increasing consumer complaints about relatively high gasoline prices in New Mexico. After my staff confirmed that (a) retail prices had in fact increased sharply during April and (b) that these price increases appeared to result in part from similar increases in wholesale prices at the rack, I authorized an investigation into pricing and marketing practices in the gasoline industry in New Mexico.

4. I believe that information acquired during the course of the investigation to date suggests: a) that many supply arrangements among marketers in the New Mexico market effectively impose exclusive dealing requirements on marketers which may unreasonably restrain trade; b) that refiners and/or distributors may be allocating customers and territory; c) that suppliers may be engaging in predatory, discriminatory pricing and refusals to deal; and d) that price-fixing in certain markets may be occurring.

5. I believe that the potentially illegal conduct described above together with demonstrably high prices in this state suggest that certain gasoline marketers may be violating the New Mexico Antitrust Act.

6. I believe that Latasa Oil Company, Inc. ("Latasa Oil") and other New Mexico marketers may possess and control information relevant to the investigation for violations of the New Mexico Antitrust Act which I requested and authorized in May 1993.

8. I authorized my staff to apply for civil investigative demands ("CID") to Latasa Oil in aid of our investigation for violations of the Antitrust Act.

9. This investigation was not prompted in any way by requests from legislators, individually or otherwise, to investigate the gasoline industry.

10. The CIDs at issue were not sought for the purpose of obtaining information for the New Mexico Legislature. Nor, indeed, could we seek information under a CID for this purpose since Section 57-1-5(C) of the New

Mexico Antitrust Act requires that all information provided to this office in response to a CID be kept confidential.

11. The statement contained in the Introduction to the May 1994 report entitled *Gasoline Pricing and Marketing in New Mexico, An Interim Report* to the effect that "our intensive study of this industry's pricing behavior will- . . . supply the kind of detailed and sophisticated information which will be needed to deal with these issues [lack of price competition in gasoline markets]" does not mean that I or anybody in this office intends to give the Legislature or any members thereof documents or information protected by Section 57-1-5(C) of the Act.

12. My purpose in instituting this investigation was to determine whether high prices in this state are the product of conduct violating the antitrust laws.

13. Because I am also called upon to advise the New Mexico Legislature concerning proposed legislation and the Legislature has made clear that competition in gasoline markets is a matter of continuing concern, I have directed my staff to review and analyze legislation enacted in other states directed to increasing competition in gasoline markets. However, my purpose in authorizing the contested CIDs was and continues to be determining whether the antitrust laws are being violated by those marketing gasoline in New Mexico.

14. Because we are a public agency answerable to the public, all major decisions in this office are made with due consideration to public interest, public perception

and public opinion, but no decision is made on an investigation of this magnitude based solely or even principally upon those considerations. My decision to authorize this investigation was based on my professional judgment and my continuing belief that antitrust violations may be occurring.

15. I deny that this investigation was initiated or is being pursued for political gain.

16. This affidavit is submitted for the limited purpose of responding to certain allegations raised by Latasa Oil in its Motion for Summary Judgment.

/s/ Tom Udall
Tom Udall

Subscribed and sworn to before me
this 28th day of December, 1994.

/s/ Margie D. Sandoval
Notary Public

My Commission expires:

Feb. 23, 1995

(3)

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 96-328

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

The Wilson Corporation, *et al.*,
Petitioners,

v.

Tom Udall, Attorney General of New Mexico,
Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of New Mexico

---

PETITIONS' REPLY BRIEF

F. Edwin Hallman, Jr.
Counsel of Record

F. Edwin Hallman, Jr.
David C. Moss
Decker & Hallman
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500
Counsel for Petitioners

October 11, 1996

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1. The Question Presented Involves a New Mexico Court of Appeals' Holding in this Case.

Respondent incorrectly states in its Brief in Opposition (hereinafter "Respondent's Brief") that the Question Presented addresses a holding by the New Mexico Court of Appeals in an earlier, related case. *See*, Respondent's Brief, p. 2. The Question Presented arises from the New Mexico Court of Appeals' holding found at *The Wilson Corp. v. State of New Mexico*, 121 N.M. 677, 916 P.2d 1344 (1996).

Specifically, the Question Presented arises from the holding that:

> The district court had ruled that the Attorney General had an improper purpose in seeking the CIDs. We reversed, holding that (1) the CIDs could be quashed only if the sole purpose of the Attorney General was an improper one . . .

Wilson, 916 P.2d at 1347.

The New Mexico Court of Appeals remanded the case in *Brewer Oil Co. v. State of New Mexico*, 121 N.M. 106, 908 P.2d 799 *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995) for further proceedings. An appeal in *Brewer* to the New Mexico Supreme Court was not available since the case was remanded for further proceedings. Further, a petition for certiorari to this Court was not available in

Brewer because the highest court in New Mexico had not entered a final decision in the case. The final decision from which this Petition is filed occurred in this case only, notwithstanding the Respondent's attempt to mislead this Court.

The Question Presented arises from this case and no other.

2. Petitioners Accurately Stated the Law in *U.S. v. Powell*.

Respondent failed to address the complete opinion in *U.S. v. Powell*, 379 U.S. 48 (1964). In *Powell*, this Court opined that:

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

U.S. v. Powell, 379 U.S. at 58. Whether this Court set forth four or five requirements in *Powell* is irrelevant to an interpretation of what the opinion, read in its entirety, requires before a civil investigative demand ("CID") may be enforced. This Court's holding in *Powell* clearly

requires that CIDs may not be abused for improper purposes, even if an alleged proper purpose of conducting an investigation is also present. Approval by this Court of the improper purposes in Respondent's investigation will create a road map of approval of violations of the most basic constitutional due process prohibitions, especially if such improper purposes can be overshadowed by the guise of Respondent simply alleging a proper purpose.

3. The Affidavits Should Not Have Been Considered by the Trial Court.

The Affidavits referenced by Respondent, which allege a proper purpose, were submitted after the evidence was closed at the end of the hearing before the Trial Court. The New Mexico Court of Appeals in this case held that:

> Although the affidavits were submitted after the evidentiary hearing, the district court accepted and considered them. On appeal the Marketers have not challenged their untimeliness. In our view, it is within the district court's discretion to accept the affidavits after the hearing, at least so long as the Marketers were not precluded from responding to them if they desired.

Wilson, 916 P.2d at 1353. Petitioners, however, were not allowed to respond to the Affidavits which were filed after the ballgame was over. Further, the Affidavits, at best, established only one proper purpose. The Affidavits failed

to deny or contradict the multiple improper purposes established by the uncontroverted evidence presented by Petitioners during the hearing.

4. Petitioners Did Not Waive Their Right To Petition for Certiorari to this Court.

Petitioners, in response to Respondent's request for the Trial Court to enforce the CIDs, argued that the CIDs violated the due process requirements of the United States Constitution and the New Mexico Constitution. The Trial Court's opinion did not address the issue of whether Respondent's actions violated the United States Constitution. The Trial Court, instead, ruled in favor of Respondent and enforced the CIDs on other grounds.

The New Mexico Court of Appeals in *Wilson*, however, based its opinion on this Court's holding in *Powell* and found that a showing of at least one proper purpose was all that was required to enforce CIDs. *Wilson*, 916 P.2d at 1352. Since the Trial Court had not addressed *Powell* or the "one proper purpose" doctrine created by the New Mexico Court of Appeals on appeal, Petitioners had no reason to raise the issue of the violation of the United States Constitution regarding the Trial Court's opinion, until the New Mexico Court of Appeals issued the decision in this case.

Petitioners, in their Petition for Certiorari to the New Mexico Supreme Court, argued that the holding of the New Mexico Court of Appeals violated the due process requirements of the United States Constitution.

Accordingly, Petitioners preserved for review the Question Presented set forth in their Petition for Certiorari to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

F. EDWIN HALLMAN, JR.
DAVID C. MOSS
Counsel of Record

Decker & Hallman
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500

Counsel for Petitioners

October 11, 1996

No. 96-328

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

The Wilson Corporation, *et al.*,
Petitioners,

v.

Tom Udall, Attorney General of New Mexico,
Respondent.

CERTIFICATE OF SERVICE

I, F. Edwin Hallman, Jr., a member of the Bar of this Court, hereby certify that on this 11th day of October, 1996, three copies of the Petitioners' Reply Brief in the above-styled case were mailed, first class postage prepaid, to:

Susan G. White, Esq.
Assistant Attorney General
6301 Indian School Rd., N.E., Suite 400
Albuquerque, NM, 87110

Jerome Marshak, Esq.
Assistant Attorney General
P. O. Drawer 1508
Santa Fe, NM, 87504-1508

counsel for all the respondents herein. I further certify that all parties required to be served have been served.

F. EDWIN HALLMAN, JR.
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 522-1500
Counsel for Petitioners